

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 1051

ROBERT SWAIN, PETITIONER,

vs.

ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA

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[fol. 1]

**IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA, TWENTY-NINTH JUDICIAL CIRCUIT**

CAPTION

State of Alabama, Talladega County

At a regular, special or adjourned term of the Circuit Court of Talladega County, Alabama, at which the officers authorized by law to hold or serve said Court were serving, the following proceedings were had in this cause styled:

Case No. 6134

STATE OF ALABAMA,

vs.

ROBERT SWAIN.

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

AFFIDAVIT AND WARRANT OF ARREST

Intermediate Court of Talladega County, Alabama

COMPLAINT

Before me, the undersigned authority, personally appeared Mrs. Mable F. Butterworth, who, being duly sworn, says on oath that she has probable cause for believing, and does believe, that in said county and State, on or about the 7th day of February, 1962, one Robert Swain forcibly ravished Jimmie Sue Butterworth, a woman, against the peace and dignity of the State of Alabama.

/s/ **Mrs. Mable F. Butterworth.**

Sworn to and subscribed before me this the 7th day of February, 1962.

/s/ **W. E. Hollingsworth, Jr., Solicitor 29th Judicial Circuit, Alabama.**

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

State of Alabama, Talladega County

WRIT OF ARREST—February 7, 1962

To Any Lawful Officer of the State of Alabama—Greetings:

You are hereby commanded to arrest: Robert Swain and commit him to jail unless he give bond in the sum of—no bond set in said case, for his appearance in this Court on the 5th day of March, 1962, to answer the State of Alabama on a charge of Rape preferred by Mrs. Mable F. Butterworth.

Dated, this the 7th day of February, 1962.

/s/ W. E. Hollingsworth, Jr., Solicitor 29th Judicial Circuit, Ala.

[fol. 2] Executing by arresting the within Defendant and committing to jail on the 7th day of February, 1962.

/s/ Luke Brewer, Sheriff.

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

Spring Term, 1962

INDICTMENT—Filed April 17, 1962

The Grand Jury of said County charged that before the finding of this Indictment, Robert Swain whose true name is to the Grand Jury unknown otherwise than stated, forcibly ravished Jimmie Sue Butterworth, a woman, against the peace and dignity of the State of Alabama.

/s/ W. E. Hollingsworth, Jr., Solicitor of the Twenty-Ninth Judicial Circuit of Alabama.

A True Bill:—

/s/ Ira J. Freeman, Foreman Grand Jury.

Filed in open court on the 17th day of April, 1962, in
the presence of the Grand Jury.

/s/ A. K. Wood, Clerk.

Presented to the presiding Judge in open Court by the
Foreman of the Grand Jury, in the presence of 17 other
Grand Jurors, and filed by order of the Court this 17th
day of April, 1962.

/s/ A. K. Wood, Clerk.

Bail denied this 18th day of April, 1962.

/s/ William C. Sullivan, Judge Presiding.

[fol. 3] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

Case No. 6134

[Title omitted]

MOTION TO QUASH INDICTMENT—Filed April 25, 1962

Now, comes the defendant, Robert Swain, and respectfully moves this Honorable Court to quash the indictment returned in this cause, and to hold the same for naught; and in support of said Motion alleges the following, to-wit:

1. For that defendant is a member of the Negro race and a citizen of the State of Alabama, and of the United States of America, and was at the time the Grand Jury of Talladega County, Alabama returned the indictment in this cause on to-wit: April 11, 1962, and for many years prior thereto, and at the present time, Negroes were, and are, systematically excluded from Grand Juries organized in said County and State, solely because of their race or color; or are discriminated against in the organization of Grand Juries in said County of said State solely because of their race or color in that no member of said race, or a mere token number, are included on the jury roll or have their names placed in the jury box; or if they are placed on the jury roll or in the jury box, they are not drawn for service on any

Grand Jury; thereby denying to the defendant due process, and equal protection of the laws guaranteed him by the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States of America.

2. Defendant avers that no Negro served on the Grand Jury which returned the aforesaid indictment against him in this cause, nor has any Negro served on a Talladega County, Alabama Grand Jury in modern times; or if any Negroes have served on any of said Grand Juries, such service has only constituted a mere token number of eligible Negro male citizens.

3. Defendant avers the existence of a system, or practice, or custom, in the drawing or organization of Grand Juries to serve in Talladega County, Alabama, designed to totally exclude Negroes from service on such Grand Juries or to discriminate against Negroes solely on account of their race or color; contrary to the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment of the United States Constitution.

[fol. 4] 4. Defendant avers that at the time the Grand Jury returned the indictment in this cause, according to the 17th Decennial Census of the United States, its Territories and Possessions for 1960, published by the United States Department of Commerce, Bureau of Census, of which the Courts of Alabama take judicial notice, the white male population of Talladega County, twenty-one (21) years and over, numbers 12,125, and that the negro male population of said County in said age group numbers 4,281; and defendant avers that the great majority of the aforesaid householders and freeholders in said County and State, generally reputed to be honest and intelligent men, esteemed in the community for their integrity and good character and that they are not habitual drunkards nor afflicted with such disease or physical weakness as would disqualify them to discharge the duties of grand jurors, and that they otherwise possess all of the qualifications set out in the Constitution and Laws of the State of Alabama and the United States which govern the selection and service of Grand Jurors, yet the jury commission failed or refused to place on the jury roll, and in the jury box the

names of such Negro male citizens of Talladega County, Alabama, and that at the time of said indictment and the present time, the jury roll of said County contains less than five percent of the names of the total number of Negro males eligibles, under the Constitution and Laws of the State of Alabama, and of the United States, for jury duty in said County. Defendant avers further that the method of selection of the names of Negroes be placed on the jury roll and in the jury box of Talladega County, Alabama, by the jury commission, is highly irregular and arbitrary and contrary to the method prescribed by the Constitution and Laws of the State of Alabama, and of the United States, thereby depriving the defendant of rights guaranteed him by the Constitution and Laws of the said State of Alabama, and by the Constitution of the Untied States of America, especially to the Fourteenth Amendment to the Constitution of the United States of America guaranteeing to defendant due process of laws, and the equal protection of the laws, and said indictment is void.

5. Defendant avers that members of the Negro race are, solely because of their race or color, arbitrarily, intentionally, and systematically excluded in the selection of persons for Grand Jury duty, in that the great majority of those qualified for service in Talladega County, Alabama, are not included on the jury roll, or if included on said roll, their names are left out of the jury box, or if put into the box and drawn, they are not listed for service, and because of the aforesaid practices, no Negroes, or only a mere token number have served on a Grand Jury in Talladega County, Alabama since the days of Reconstruction, or certainly not in modern times, and defendant avers that the Grand Jury which returned the aforesaid indictment against him was organized according to and in keeping, [fols. 5-6] with the aforesaid practice, thereby depriving defendant of due process and equal protection of the laws, guaranteed him by the Constitution and Laws of the State of Alabama, and the Constitution of the United States of America.

Wherefore, the defendant prays that this Court will take notice of this his Motion to Quash the Indictment in

the above said cause, and set said Motion down for a hearing, and that your Honor will, after consideration of the evidence and proof which the defendant offers to make, grant said motion.

Respectfully submitted, /s/ Robert Swain.

Sworn to and subscribed before me this 25th day of April, 1962.

/s/ Peter A. Hall, Notary Public. /s/ Orzell Billingsley, Jr., /s/ Peter A. Hall, Attorneys for Defendant.

The foregoing Motion being presented this 25th day of April, 1962 is hereby set for hearing before the Honorable William C. Sullivan, Judge, on the 24th day of May, 1962, at 10:00 o'clock, A. M.

/s/ William C. Sullivan, Judge.

We hereby certify that we have served a copy of the above Motion on the Honorable W. E. Hollingsworth, Jr., on this 25th day of April, 1962.

/s/ Orzell Billingsley, Jr., Attorney for Defendant.

[File Endorsement Omitted.]

ORDER OF DENIAL—May 25, 1962

On this the 25th day of May, 1962, the foregoing motion being considered and understood by the Court, the Court having heard and considered the evidence in support of said motion and evidence offered in opposition to said motion, the Court find and it is the considered judgment of the Court that the allegations contained therein are untrue and not supported by the evidence and that said motion should be denied.

It is therefore, ordered, adjudged and decreed that said motion be, and the same is hereby denied.

Defendant is hereby allowed an exception to this ruling of the Court.

Done this the 25th day of May, 1962.

/s/ William C. Sullivan, Circuit Judge.

[fol. 7] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA, TWENTY-NINTH JUDICIAL CIRCUIT

Case No. 6134

STATE OF ALABAMA, Plaintiff,

vs.

ROBERT SWAIN, Defendant.

Transcript of hearing—May 24, 1962

Be it remembered that heretofore, on Thursday, the 24th day of May, 1962, in the presence of the defendant, the above entitled cause came on for hearing on the motion to quash the indictment, before the Honorable William C. Sullivan, Judge of the 29th Judicial Circuit of Alabama.

APPEARANCES:

For the State of Alabama: W. E. Hollingsworth, Jr., Solicitor from the 29th Judicial Circuit of Alabama, H. M. Love, Special Prosecutor, Talladega, Alabama.

For the Defendant: Orzell Billingsley, Jr., Birmingham, Alabama, Peter A. Hall, Birmingham, Alabama.

And thereupon the following proceedings were had in open court in due form of law.

WILLIAM E. HOLLINGSWORTH, JR.: The first witness called, having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name, for the record, please?

A. William E. Hollingsworth, Jr.

Q. Where do you live, Mr. Hollingsworth?

A. 1016 Dellwood Drive, Talladega, Alabama.

Q. What is your profession?

A. I am circuit solicitor for the 29th Judicial Circuit of Alabama.

Q. How long have you been circuit solicitor?

A. I have been circuit solicitor since, I believe January of 1953.

Q. What was your profession prior to that time?

A. A few months prior to that time I was appointed Special Attorney General in this county for some three or four months and prior to that time I practiced law for a little over two and a half years.

Q. When did you start practice of law?

A. Two years. I began the practice of law in January of 1950.

Q. That was in Talladega County?

A. Talladega County, State of Alabama.

Q. During the time you were practicing law, did you engage in any criminal work?

A. I had a few cases.

Q. But you have been circuit solicitor since 1953?

A. That's correct.

Q. I'll ask you, as Circuit Solicitor, are you present at organization of grand juries?

A. I have been present at all the grand juries which have been organized since January, 1953.

Q. Were you present at the organization of the grand jury which indicted this defendant?

A. I was.

Q. Were there any negroes present on that grand jury?

A. There were.

Q. How many negroes were there?

A. There were not less than four nor more than five. I wouldn't want to swear there were four or five because I don't recall. There were two negroes drawn from the hat to sit on that particular jury and they did sit. They were present during the entire deliberation and I understand that one of them is here this morning. He is supposed to be. He has been subpoenaed by you.

Q. What is his name?

A. His name is Sam P. Chatman. I believe that he will be the same man. I haven't seen him this morning, but his name is the same.

Q. You stated that there were two negroes on this grand jury that indicted this defendant?

A. That's right. There were some four or five on the venire, out of some—in my best judgment, around 35 that were in here to be drawn from.

Q. Do you remember how many names were on that venire?

A. I don't know. The clerk would have that information.

Q. What is your best judgment, in your best judgment?

A. I would say approximately 35.

[fol. 9] Q. Out of that you had four negroes?

A. It might have been five.

Q. Four or five. Is that the largest venire you ever have for the drawing of a grand jury?

A. We have had three negroes on grand juries to serve on more than one occasion.

Q. When was the last time you had as many as three?

A. I couldn't answer that question without going back into the record.

Q. How many times a year do you organize a Grand Jury in this county?

A. Four and we have organized as few as three. It depends upon the situation, that is the condition of the grand jury docket itself. If it is running heavy and if it needs attention—we try to keep the docket as current as we can.

Q. In other words, you organize three or four grand juries during a year?

A. That's right.

Q. There may be three or four?

A. That's right. Now, we have had no less than three and some years we have had to call them back into session.

Q. How many grand juries have you organized this year?

A. I believe one. That is my best judgment.

Q. Do you recall how many grand juries you organized last year?

A. It was either three or four.

Q. Do you recall whether or not any negroes served on those?

A. I recall the grand jury before this last one, there was no member of the negro race on that grand jury.

Q. There was no member of the negro race on the last one?

A. Not the last one, but I mean the one before the last one.

Q. Can you recall the grand jury that was organized prior to that grand jury?

A. There were negroes on that grand jury in my best judgment.

Q. But you aren't sure?

A. That was the only one that I recall that there were no negroes on. In fact, I will say this. I don't believe there have been over three or four grand juries since 1953 that haven't had members of the negro race on them.

Q. Are you acquainted with the population ratio of negroes and whites in this county?

A. Approximately.

Q. In your best judgment, what would be the population ratio between negroes and whites?

[fol. 10] A. I would say approximately 39 or 40 percent negro and probably 60 or 61 percent white.

Q. I am trying to lay a foundation—have you seen as many as forty percent negroes serving on any grand jury in this county?

A. I have not. Twenty-three percent is the highest figure that I have seen at any time on any jury venire in this county.

Q. When did you see that 23 percent?

A. It was in the summer of 1955.

Q. Have you seen as much as 23 percent since 1955?

A. I don't believe I have.

Q. Have you seen as much as twenty percent since 1955?

A. I don't believe I have.

Q. Fifteen percent?

A. I couldn't say exactly but you are getting, in my judgment, somewhere around what would be the ratio.

Q. What ratio?

A. That is, you asked me what the population ratio was I told you 39 or 40 percent negro and it would be somewhere around—most of the jury venires, I would say would range anywhere from, possibly ten or twelve, or fifteen or maybe higher, but I don't think any of them would go as high as 23 percent.

Q. Are you stating then that the number of names on

the jury roll are approximately fifteen or twenty percent of your negro male population?

A. I couldn't answer that question now, because I have never seen the jury roll. Let me qualify that. My answer would have to be on a lot of these petit jury and non-capital cases, the judge excuses many of these prospective jurors before they ever come to court, according to law. That is, for sickness in the family, a business excuse, an emergency in their business, and with the understanding here, he doesn't contact the solicitor, he doesn't contact the plaintiff's or defendant's attorney, anybody's attorney in these petit civil cases and non-capital felony cases. So, I would have no way of knowing what percentage of the negro prospective jurors had been excused by the judge prior to them coming into court. Now, my answer is based upon what I have observed while trying criminal cases in this courtroom.

Q. Do you know whether or not the jury commission places the names of negroes and white on the jury roll in proportion to the population?

A. I don't—as I have said, I have never been present during their meetings while they were handling their busi-[fol. 11] ness and I don't know. They will have to answer those questions. I don't know what ratio they use.

Q. I'll ask you this. Have you seen as many as ten percent of negroes on the jury venire?

A. I saw that the last grand jury when the defendant here was indicted.

Q. You saw as many as ten percent?

A. Sure. There were four or five colored males here at that time over the age of 21, prospective jurors, and I would say there might have been as few as 32 and absolutely no more than 40, I would say approximately 35 members here, would *would* have been in excess of ten percent or probably twelve and a half or maybe fifteen percent.

Q. Do you often see venires that consist of no more than 35 persons?

A. For grand juries, because we don't try civil cases as a rule. That has been done maybe once or twice, but that is the only court in session is the grand jury.

Q. In other words, you never draw more than 35 names for grand jury?

A. They would draw fifty, maybe sixty names.

Q. Do you ever draw as many as 80?

A. I don't believe so. That is my best judgment. I believe you would find somewhere in the neighborhood of 50 or 60 would be accurate.

Q. Do you know whether there is any particular reason why only 35 names are drawn for the purpose of organizing a grand jury?

A. There were more than 35 drawn. I say, they are the ones, that after the grand jury was qualified, they were left to be drawn from. In other words, I am not counting the ones that were excused. Now, in this county, we have a lot of negro school teachers here and they are eligible for jury duty, but while school is in session many of them come in and they are exempt, as you know. Many of them will call the judge prior to court and ask to be excused.

Q. What I am trying to understand is the venire itself, regardless of how many have been excused. I want to know how many were on the venire?

A. I couldn't tell you that because in this county there are no markings to indicate colored or white on the jury list and if I don't recognize a colored man or know him or know the vicinity where he lives, for instance, college hill or Pullium Street or some address that I know is predominately colored, unless I know him personally, then I wouldn't know whether he was a white man or whether he was a colored man.

Q. Do you have a wide acquaintance in this county among negroes?

A. I know a good many of them.

[fol. 12] Q. Could you look at the jury roll and estimate pretty well how many negroes are on that jury roll?

A. I could in the vicinity of Talladega better than I could at Childersburg or Sylacauga, because I have lived in the north end of the county nearly all my life.

Q. Is your acquaintance pretty wide among whites in this county?

A. Fairly.

Q. Could you look at a venire and pretty well tell who was white and who was colored?

A. Not every time.

Q. Could you pick out—would you be able to tell as many as fifty percent of the persons listed on the jury venire?

A. I believe you could tell as many as fifty percent of the colored people on the venire because of their address. And because of the names that you knew personally. I believe that.

Q. Generally most negroes live in certain areas, and whites live in certain areas in this county. Is that right? I am asking.

A. There are some streets where they meet but—for instance South Street here in Talladega where they live side by side, or Spring Street. But if it is Knoxville or White's Road or somewhere out in there, or Short White's Road, well, it could be white or colored, but you have got certain territories like Needmore, or Wallis Quarters or something like that that you know is colored quarters, and if you read that by a man's name, most likely he is a colored man. We assume he is colored until we see him, at least I do.

Q. I'll ask you, is this county divided up into precincts?

A. I don't understand that question?

Q. For voting purposes?

A. It is divided into beats, that's correct.

Q. Is it divided into precincts or beats?

A. Well, a precinct and a beat, that might be the same.

Q. I'll ask you, you have had occasion to try—in fact you try most of the criminal cases in this county, have you not?

A. All except four or five where there has been for one reason or another a special solicitor appointed.

Q. How many criminal cases have you tried this year?

A. I would say probably eight cases this year with juries.

Q. With petit juries?

[fol. 13] A. Yes.

Q. Were any negroes serving on the petit juries?

A. There were no negroes on the jury that actually tried the cases.

Q. None of those eight cases?

A. That's correct.

Q. You tried cases last year, 1961?

A. I did.

Q. In your best judgment how many cases did you try last year?

A. I couldn't be very accurate about that unless I had some record.

Q. In your best judgment would you say you tried as many as forty?

A. Our calendar usually sets up one criminal week a month, and sometimes with the pleas of guilt, it makes it unnecessary to hold each and every week. It would be approximately thirty, maybe forty. I would say 30 would be a high estimate.

Q. Did you observe any negroes serving on a petit jury last year?

A. Not on non-capital felony cases.

Q. Did you observe them serving on capital cases?

A. I did not.

Q. Year before last did you observe any negroes serving on a petit jury?

A. Not on a petit jury.

Q. When was the last time you observed negroes serving on a petit jury?

A. I have never observed a negro serving on a petit jury in this county since 1950, since I have been coming to this courtroom.

Q. Now, some of those cases were cases in which negroes were defendants, were they not?

A. That's correct.

Q. As a matter of fact, it is possible that most of the defendants were negroes, were they not?

A. I wouldn't say that. I would have to go check the statistics on that.

Q. Would you say that fifty percent of the cases you tried that you had negro defendants?

A. I imagine so. That is not accurate estimate as to how much crime, because you see we have pleas of guilt. It would be hard to say whether you tried forty percent white or sixty percent white.

Q. You are usually present at the court even when civil cases are tried, are you not?

A. I come through the courtroom occasionally.

[fol. 14] Q. Have you observed any negroes—there have been some civil cases tried this year in which a jury was involved, is that right? And you have seen them?

A. They may have had one week. They have cancelled out one that I know of.

Q. Did you observe in a petit jury in the trial of civil cases this year?

A. I have not. Now, let the record show we are talking about the jury that actually decided the case and not the jury venire.

Q. We are talking about the petit jury, the one that actually tried the case.

A. That's right. I want the record to show that.

Q. Did you observe any petit jurors in the trial of civil cases last year?

A. I did not.

Q. Well, when was the last time you had an opportunity to observe the trial of civil cases or passed through this courtroom in which a jury was sitting over in that box?

A. I have never seen a negro on a civil case.

Q. Do you have any knowledge of any negro at any time having ever served on a petit jury in this county?

A. Not to my own personal knowledge. Not on the cases that I have been associated with. I can't tell what is happening when I am not here. I haven't been in court a tenth of the time on civil cases. But I can speak for the criminal side of it.

Q. Have you ever been present when the persons drawn from the box for the purpose of a venire was being drawn by the judge of this court?

A. Are you talking about for civil, for petit jurors, or grand juries, or what?

Q. Either one.

A. I have been present at different drawings from time to time.

Q. Will you explain to us the procedure that is used and once the box is brought into court, what procedure is used for the purpose of getting these names to put on the venire?

A. Well, to my knowledge, the judge calls the sheriff's office for them to send up the jury box. They will send up the jury box which is a metal box which, if you would like to see it, we can have it sent up at this time, I would judge it is somewhere around 20 inches in length and possibly 14 inches wide and possibly 9 or ten inches high, and I

believe it is what I would call an army, O.D. or olive drab in color. The Judge, in the courtroom, in the presence of the officers of the court, takes the key that he has, according to law, and unlocks the box and he sits back and reaches over in a manner where he don't see whose name he is drawing, [fol. 15] and he draws them. Now, if it is a civil jury, or if it is a criminal jury, those cards are then placed into an envelope and sealed up and he will put "Jury Venire", for a certain week, and the date drawn, and turn them over to the clerk. The box is locked and turned back over to the sheriff and in substance that is the drawing of the jury venire. It is done in open court all the time that I have ever seen it drawn.

Q. Is this venire put out before—for instance, if this case is set for Monday of the coming week and the venire was drawn last week—when is the venire available for the attorneys to observe it?

A. It is just a matter of a few days.

Q. You can get the venire before the week of the trial?

A. That is available to every lawyer in the state that has got a case set for trial and if a defendant up here doesn't have a lawyer, he can go by the clerk's office and request one and get it himself.

Q. How soon can you get the venire after it is drawn by the judge—and what period of time—does a specific period of time—

A. Well, it depends on the business in the clerk's office. They take it in there and they do what the law says for them to do and then they send them on to the sheriff's office and then they are served and somewhere down the line, you would have to ask the clerk, I am not familiar with that, but then he has an original docket with all the jurors and then from that list a mimeographed sheet is made showing who was subpoenaed to come in as a juror for that particular week. Those are the sheets that I am talking about that are available.

Q. Is the venire available to you or say to other attorneys in this county at least a week before the term of court?

A. As a rule they are available at least a week or more.

Q. Then the persons who have been selected as jurors appear in court on Monday, do they not?

A. Sometimes they will come in before Monday to see the judge wanting off. For different reasons.

Q. Those who want to serve on the jury?

A. They will report to court at 9:00 o'clock on the Monday that it is set.

Q. Now, when they appear, usually you might have as many as 70 or 80?

A. On capital weeks—now this is what you have there. The jury box is filled every two years unless it is depleted before that time and—for instance Childersburg, a few years ago, where you have got an industrial area, you have [fol. 16] a lot of people come in and move out, now some dockets there might be as high as ten or fifteen percent of the ones not found, they have left the county, because of the type employment they had. As a rule on a capital week where there are about 95 subpoenaed, we usually will have 75, I would say, or approximately 75 report in on Monday. It has been less and probably been more. It is hard to give an average on something like that.

Q. In this county you have only one trial judge, is that correct?

A. That's correct.

Q. Is this venire broken down into panels of 24 or 36?

A. No. We strike from the entire—

Q. (interrupting) You strike from the entire 75?

A. Well, what will happen when the 75 get in here, a lot of them will get excused in open court, some will be over 65. Some will be in the national guard. Some will be hauling passengers for hire in interstate commerce. Out of that 75 there will be a few more that will get excused in the presence of the officers of the court and of course if it is a capital case nobody is excused out of the presence of the defendant and without his consent or the consent of his attorney in his presence.

Q. But all those persons that you just set out as asking for an excuse will be members of the white race, wouldn't they?

A. And colored members, especially school teachers and truck drivers.

Q. But those members of the national guard and those others, do you recall. Read back that answer so that I can get those people that he stated would ask to be excused?

A. There is no colored national guard in Talladega County.

Q. I was asking you whether or not all the persons that you listed in those particular occupations in your last statement, would be members of the white race rather than the negro race?

A. To my knowledge I have seen colored men driving trucks for Floyd-Beasley and other transportation lines in the county excused because of their job. Many school teachers have been excused.

Q. Do you excuse more white people than you do negroes, well not you, are more negroes excused than whites?

A. I would say it would be about in proportion as to what they were on that particular jury venire. I don't think there is any difference shown or any reason why he would excuse more than he would of the other race.

Q. Well, what would you say would be the largest number [fol: 17] of negroes you have seen on a jury venire in the last year?

A. I would say seven or eight.

Q. How many persons do you say usually get an excuse?

A. What percentage of the entire venire?

Q. Yes. Of the entire venire.

A. Well that would depend upon the circumstances in a county like this. For instance it is hard to get farmers to serve on a venire in the early summer or late spring and in the fall because of the crops and the agricultural conditions. Then during the school term, you can't get a school teacher to serve.

Q. Then if you state that the highest number of negroes you have seen on a venire is seven—

A. I said seven or eight on a venire that was ready to be struck from. Now I am not talking about the venire that you were speaking of a minute ago, in a capital case, where we are having some 70 or 75 up here.

Q. But we assume—you are saying that there were only seven negroes left after all these people were excused—that is what you are saying!

A. That's right. I have seen—when a venire comes in here, as a rule I would say seven or eight would be about average.

Q. Is that before—

A. —(interrupting) Now that is not a small venire like is on a grand jury where you would have only 35 or 40. It would be on a larger venire. It is hard to estimate, because I have seen anywhere from four to 23 in here at a time. I couldn't take four and twenty-three and add it up, or eleven or twelve or whatever, the difference would be and strike an average from it because it wouldn't be accurate.

Q. When you say you have seen 23 you mean you saw 23 in 1955?

A. That's correct.

Q. You haven't seen that number since then, have you?

A. Not to my knowledge. I am talking about percentage. 23 percent.

Q. Have you ever seen as many as fifteen organized since 1955, have you?

A. You misunderstood my answer. I was talking about 23 percent. There were only thirteen negroes on that venire in 1955, I believe it was in the month of July or August.

Q. Have you seen as many as 13 negroes on a venire since 1955?

A. I have not.

Q. The highest number you have seen was seven, is that right?

[fol. 18] A. No, I didn't say that. I understand that you had me on a kind of an average. I said seven or eight. I couldn't say what is the highest number I have seen because at the time—I specifically remember this case. It was the State vs. Charlie Miller, I believe, because Mr. Love, the attorney seated at the table, was on the other side, and we were going to get an all colored jury to try this particular defendant, and I recall that because I offered him the strike to take off the man that he wanted off out of the thirteen.

Q. Did you use an all colored jury?

A. No, sir, the defendant refused to use an all colored jury. That is what happened. He didn't want any colored people on his jury.

Q. He didn't want a colored jury?

A. That's right. He said they would make an example out of him. His brother run up and told him not to do it.

Q. In other words, he wanted to get it easier, is that what he wanted?

A. I don't know what he wanted, but that was what was said.

Q. Have you seen thirteen since then?

A. I have not.

Q. Have you seen as many as ten since then?

A. I couldn't answer that and be specific about it.

Q. Getting back to the venire, is there any agreement between—when you get ready to strike the jury for the purpose of getting a petit jury, you bring them all into this room?

A. All the jurors are usually sitting over here to your left hand side.

Q. And you strike from the entire 75?

A. What ever number is left after they have gotten excused and been properly qualified.

Q. All right. Let's assume, after everybody has been excused there are still 75 persons on a venire, you strike from that entire 75 until you get 12?

A. That is the usual procedure.

Q. I believe that is all.

Cross-examination.

Mr. Love:

Q. Mr. Hollingsworth—

A. Let me clarify this—let me finish answering his question. Sometimes, it depends on who is involved in a case. We have been very fortunate in this county, we have not had any white against black or black against white. If we have—where we have a situation arising in a case such [fol. 19] as that, in the cases that we have had—we have had no capital felonies, but, we strike a jury different from what if it was two white men involved or two colored men. Many times I have asked, Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them, and he would say, my client doesn't want them, or we don't see fit to use them.. And then if I didn't see fit to use them, then we would take them off. We would strike them first, or take them off.

Mr. Billingsley: Did you have any particular reason why you did not want to use negro jurors.

A. I would say that would have to depend upon the particular case you were trying.

Mr. Billingsley: You have stated that so far as you know—

A. I have offered to use them on one particular case.

Mr. Billingsley: On that occasion when there were thirteen on the jury venire when Mr. Love was representing the defendant.

A. That is correct. He offered to use them too.

Mr. Billingsley: But you have never had the occasion in this county to try a jury case in which there was sitting a negro juror?

A. Not on the trial of the case. I believe eighty percent of the grand juries organized since 1953 had had negro serving on the grand jury.

Mr. Billingsley: But not on petit juries?

A. Not petit juries, to my knowledge.

Mr. Billingsley: That is all.

Cross-examination.

Mr. Love:

Q. On the Charlie Miller case in 1955, he was a colored man?

A. Yes.

Q. Thirteen negroes were on the jury venire?

A. That was my recollection. I offered you to you the right to strike the one that you didn't want to use on the case, if you wanted an all negro jury.

Q. You agreed to it and I agreed to it and the defendant refused to use them?

A. Yes.

Q. That was case No. 5000?

A. That's right.

Q. Were you solicitor for the State of Alabama and

Talladega County on or about the 13th day of February, 1953 for the Grand Jury that sat and reported to the court on the 13th day of February, 1953?

[fol. 20] A. I was.

Q. Were you present when Judge Harry R. Teel ordered the jury box brought up emptied and reshuffled according to the United States Supreme Court decision?

A. That was prior to this time.

Q. I mean prior to that time, were you present?

A. I am familiar with it.

Q. On this grand jury that sat and made the report back to the court of which A. D. Jackson was foreman, on or about February 13, 1953, were there any negroes on that grand jury?

A. There were.

Q. Do you recall how many?

A. I believe there were three.

Q. The report sent back to the judge, Harry R. Teel, which you have before you there, which is part of the records of this county.

A. Let the record show that this is State Minute Book No. 4, on record in Talladega County Circuit Clerk's Office and he is referring to pages 601 and 602, which is the recording of the original grand jury report for the February Term, 1953, and signed by A. D. Jackson, foreman of the grand jury, and it was filed the 13th day of February, 1953 by Arthur K. Wood, Circuit Clerk.

Q. We will later offer this. Do you have any objection to it.

Mr. Billingsley: Yes, I do. It is irrelevant, incompetent, immaterial. Also I object to it because the proper foundation has not been laid to offer whatever that purports to be. This is something that happened in 1953. We are alleging that this discrimination against negroes in relation to jurors has existed in this county for many years and exists now.

Q. We are not offering it at this time.

Mr. Hollingsworth, assuming that a colored man is on trial in Talladega County and assuming further that there are nine, ten, eleven, seven, six colored men, do you know of anyone reason in this county that prohibits that colored

man from having those six, seven men to sit on that jury, if he desires to have them?

Mr. Billingsley: I am going to object to that. That calls for a conclusion on the solicitors part. If he can tell from his knowledge from talking to the defendants themselves.

A. May it please the court, he wanted—I gave him estimates of percentages all the way through and he asked me for a lot of conclusions, even what the clerk did, and what [fol.21] your Honor did, and nobody objected. I attempted to answer his questions, and probably as far as conclusions there is a lot of the evidence that I gave was illegal and shouldn't have been admitted, but I will submit, your Honor, that what Mr. Love asked would be legal because the attorney has opened this up by his petition as to what has happened over a ten year period. I believe he stated in that petition that there had been less than five percent, just token service for the past ten years, that no negro had served on any jury or grand jury in ten years.

The Court: State your question again.

Q. I asked if a colored man on trial in Talladega County charged with an offense, with a criminal offense, did he know of anyone—

Let me withdraw it and ask it this way.

Can the attorney for the defendant leave the negroes on the venire if he desires himself and not strike them if it is a colored man charged with crime in Talladega County?

Mr. Billingsley: We object to that, irrelevant, incompetent and immaterial.

The Court: I'll overrule.

Mr. Billingsley: We take exception.

A. I know of no occasion of any case that I have ever participated in where anybody was taken off the jury by the defendant's lawyer when the defendant himself wanted that particular person irrespective of his color to serve on that particular jury.

Q. Have you and I—

A. (interrupting) Let me say this. We have had many colored attorneys in this circuit prior to this time. Arthur Shores has been over here, he represented a defendant in

two manslaughter cases and juries were struck at that time. Certainly counsel wouldn't accuse Arthur Shores of being a part to any fraud to exclude members of the colored race from a jury in Talladega County.

Q. Have you and I on more than one occasion offered the colored defendant the opportunity to have men of their own color sit on a jury?

A. I don't know what you have done, Mr. Love. I know on that one occasion you did. I know that you represent your clients with vigor, I would testify to that.

Q. The case I am referring to is the boy up Munford, Alabama that shot the girl, and I can't think of the name right now—they had a big hedge row between the house where the shooting occurred, and it ended up with Mr. John Robinson and Luke Brewer having words, in the Sheriff's Department.

Mr. Billingsley: I object to that, your Honor, irrelevant, [fol. 22] incompetent and immaterial.

The Court: I'll sustain.

Q. That is all.

Redirect examination.

Mr. Billingsley:

Q. You said that Attorney Arthur B. Shores tried two manslaughter cases, when did this take place?

A. It was right after the Sheriff's primary eight years ago and this is 1962. That would be '54.

Q. That was a jury case?

A. I believe he represented A. C. Garrett, was his name. He was charged with—it was actually murder, but they found him guilty of manslaughter and he was charged with killing Dan Hubbard and Frasure Cole. He was a one-eyed taxi driver charged with driving drunk.

Q. Was that case tried by a jury?

A. It was.

Q. Were any negroes sitting on that jury?

A. To my knowledge there weren't.

Q. Were any negroes on the venire from which that jury was drawn?

A. Now, you are going back—I couldn't answer that question truthfully. I believe there was, but I couldn't tell you the number because that was 1954, going back to one particular case and even assuming that I have tried 30 or 40 cases a year, that would be three or four hundred cases. I couldn't go back over any one case and tell you how many old men or young men or colored men sat or didn't sit.

Q. Did Arthur Shores attack the jury system in this county at that time.

A. Yes, he did.

Q. You cannot tell us whether or not any negroes were on that venire from which the petit jury was drawn?

A. I am up here to testify to the truth, lawyer, and I don't remember and I wouldn't want to tell you something that is not accurate.

Q. You stated that Arthur Shores tried a case—

A. Yes, I remember Arthur.

Q. And you gave the precedent that he tried this case on which negroes were—

A. I gave the impression, you were talking about the lawyers depriving the defendant of the right to have negroes on a jury, and I stated that you know that Arthur Shores wouldn't do that.

[fol. 23] Q. Would you say that he was satisfied with the jury?

A. I don't know. He didn't tell me whether he was or not.

Q. But he did file a motion attacking the jury, didn't he?

A. He did.

Q. I'll ask you another question which you brought out, that many times the defendant does not want a negro to serve on a jury sworn to try him. Is that generally the case?

A. It has been the case. I couldn't say whether it is generally or not. I think that would depend on the negro and what he has done.

Q. What do you mean by what he has done?

A. Well, it would depend on what he had done, just what I said.

Q. You mean some particular crime?

A. No, I am not talking about any particular crimes. I

am talking about the facts or the situation. For instance, Charlie Miller was charged with murder of another colored man. He didn't want an all colored jury and he didn't want them mixed up, he didn't want white and negroes on the same jury.

Q. Do you mean they take different positions as to whether the crime committed involves a white person or a negro?

A. No, I didn't say that. You said that.

Q. I am trying to find out what particular reason would a negro defendant have other than—

A. Do you want to subpoena Charlie Miller. I think he is out on parole. We can get him down here and let him tell you personally why. I can't tell you why another man thinks like he does.

Q. Let me ask you this. You stated that the defendants generally do not want a negro to serve on a jury that is sworn to try him?

A. I didn't say that: I didn't — they generally didn't want it. I said in the past there has been occasion here where that has happened.

Q. Have there been any cases where they did want negroes to serve on juries in their behalf?

A. I wouldn't know if there has been. Not to my knowledge, because I am not representing defendants. I am representing the State. Do you see what I mean?

Q. Yes.

A. In other words, that would be between attorney and client, privileged, and I wouldn't know what they wanted. You would have to ask these defense attorneys about that.

[fol. 24] Q. To refresh your recollection, you mentioned Charlie Miller.

A. Yes, we discussed it in open court here, about him, out of the presence of the jury. But I offered it to him.

Q. Had he had the opportunity to discuss such a situation in the trial of any other criminal case?

A. Back during that particular time I believe other occasions arose, I believe that has been discussed.

Q. Have you had a situation, a discussion of that type this year?

A. No.

Q. Last year?

A. I don't believe so.

Q. In other words, the lawyers have discussed that matter with you after you indicated that you would be willing to leave some negroes on the venire?

A. No, it is not like that at all. If I am trying a case for the State, I will ask them what is their wish, do they want them, and they will as a rule discuss it with their client, and then they will say, we don't want them. If we are not going to want them, if he doesn't want them, and if I don't want them, what we do then is just take them off. Strike them first.

Q. Suppose that the attorney and his defendant want negroes on a jury. What would be your position then?

A. That would depend on the case, the time.

Q. In other words, you might would agree to let negroes stay on a jury, is that right?

A. I didn't say that. I would say it would depend upon the circumstances and the conditions and the case and what I thought justice demanded and what it was in that particular case.

Q. Now, would you be agreeable depending upon the circumstances of the case, to letting a negro stay on a petit jury?

Mr. Hollingsworth: Judge, I am going to object to answering that question.

The Court: I'll sustain. Mr. Hollingsworth's wishes are not relevant to the issues involved in this case.

Q. That is all.

(Witness excused.)

[fol. 25] HUEL M. LOVE: The next witness called, having been duly sworn, testified as follows:

Direct Examination.

Mr. Billingsley:

Q. State your name please?

A. Huel M. Love.

Q. Where do you live?

A. I live out at Shocco Springs. At the time I am staying in Birmingham, commuting from Howard College to Talladega each morning and afternoon.

Q. But your residence is in Talladega?

A. New Shocco Springs road, Talladega.

Q. Talladega County, Alabama?

A. That's right.

Q. What is your profession?

A. I am an attorney.

Q. Are you a practicing attorney in Talladega County, Alabama?

A. I am.

Q. How long have you been engaged in the practice of law?

A. Since August, 1949.

Q. I'll ask you, Mr. Love, whether or not you engage in a particular branch of the law?

A. Well, in Talladega County you have to engage in all phases of it to make a living.

Q. In other words you are in the general practice?

A. General practice.

Q. You handle both civil and criminal cases?

A. Civil, criminal, bankruptcy, debtors petitions or anything else that comes along. We don't exclude any of it, collections, deeds, or anything.

Q. Have you handled many criminal cases?

A. I have handled quite a few.

Q. Have you handled many criminal cases in which you were representing defendants who were either white or negro, before a petit jury?

A. I would say approximately 99 percent of my work has been defensive work.

Q. Ninety nine percent of your work is what?

A. Ninety-nine percent of my criminal practice I represented the defendant. I have been special prosecutor probably on six or seven cases since 1949.

Q. Does this include both negroes and white?

A. Negroes and white.

[fol. 26] Q. Would you say that you have represented a larger percentage of negroes than whites in the trial of criminal cases?

A. I couldn't say that.

Q. Instead of fifty-fifty—I am just trying to get an estimate?

A. Now, here is the thing about it. Most times on arraignment you probably represent seven, eight or ten people and some will plead guilty and on arraignment. Even though you represent them you enter a plea for them. On the trial, I would say probably it would run approximately fifty-fifty or maybe sixty-forty, something like that, sixty colored and forty white.

Q. Have you ever tried a case before a petit jury in which there was a negro member on that petit jury?

A. Yes, I have tried cases where there were negroes on the petit jury, but not in Talladega County.

Q. In Talladega County?

A. No, I have never.

Q. Have you ever tried any civil cases where there were negroes sitting as members of the petit jury?

A. Not in the twelve men who determine the issues. On each venire we have colored. I have had the opportunity to use them.

Q. I am talking about the petit jury that tried the case?

A. The twelve that actually sat, no.

Q. Have you ever seen a negro serving on a petit jury in this county?

A. Not that I remember I don't.

Q. Have you been present when grand juries were organized?

A. Very few grand juries I have ever been present when they were organized. I have on a few occasions.

Q. Do you recall any negroes who were part of the grand jury?

A. On the few occasions that I have been here, yes.

Q. What is the largest number you have ever seen sitting on a grand jury?

A. I don't know.

Q. Your best judgment, has it been as many as one?

A. Oh, I have seen four, five and six.

Q. Have you seen more than six?

A. I don't know. I can't say that on—you see, as Mr. Hollingsworth explained on a grand jury there is not as many members drawn as would be for a jury venire, and [fol. 27] I can't say that I have seen over six. I never

have paid it any attention other than know, now for instance, a lot of these colored people I know, I have seen up here. I have seen Joe English up here. I have seen Bod Strickland up here.

Q. Do you mean you have seen them on the grand jury?

A. Or called for the grand jury. I don't know whether they have served.

Q. Have you seen them called on the venire for the petit jury?

A. I have seen them called on the venire for the petit jury. In fact, I have gotten some of them off.

Q. Have you had an opportunity observe whether or not the same negroes were called over and over again?

A. No, you don't—they are never called but once every two years.

Q. You do have a wide acquaintance among negroes in Talladega County?

A. Yes.

Q. And you have also a wide acquaintance among white in the county?

A. Yes, I do.

Q. You could pretty well go down the jury roll and determine who was white and who was colored by name and address?

A. I know a great percent of the colored people by name and face and I know a great percent of the white people in this county by name and face and I would be able to determine the majority. If we had 100 men on a jury roll I would know at least 80 percent of them.

Q. You heard Mr. Hollingsworth's testimony, didn't you?

A. Right.

Q. And in your testimony you state that you have only seen, the highest number you have seen serving on a grand jury was five—

A. Five or six, something like that. Don't pin me down on my number because I have never counted them as such. I had no reason to count them.

Q. You don't have any other knowledge of any more than six serving on any grand jury?

A. No. Don't misunderstand me. Unless I have some business over here when a grand jury is in session or called

for a term, with the court, I am not here. Mr. Hollingsworth is here, I assume at all times, but I am not. I have no business here.

Q. Considering the population ratio of negroes and whites in this county, wouldn't it be mathematically impossible never to get more than five or six negroes on any grand [fol. 28] jury?

Mr. Hollingsworth: I am going to object to that.

A. I don't know.

Mr. Hollingsworth: We move to exclude his answer if she wrote it down.

Q. He didn't answer I don't think.

Have you ever been present when the judge has drawn the names from the jury box to be placed on the venire?

A. For jury duty, but not grand jury?

Q. Yes.

A. I am present most times when he does that.

Q. Now, in the trial of your criminal cases have you had an agreement with the solicitor that because your client, defendant, did not want negroes on the jury that all of them would be struck?

A. Now, let me make a statement. I don't know whether I should make it or not. But I don't think I have ever defended a defendant in my life at any time that I didn't ask him personally on a jury roll, that if there were any of those people on there that he wanted me to keep, whether he be colored or whether he be white. I have never refused to give him a right to do such. The majority of the time I will ask a colored person that I am defending, do you want the colored race on your jury. I do that almost every time. On one occasion that I was asking about while ago, the name is Guy Handley. He lived up here at Munford. I remember his name now. The jury acquitted him. We had eleven, I remember specifically, at that time. I did discuss with the solicitor the possibility of drawing some more colored people, getting them in here if we could get them, to give him a colored jury. That he did refuse. I mean, I discussed that with the defendant himself. If I am defending one, and he wants colored left on there I will not agree to strike them. If he does not want colored

on there I will agree to do it and just take them off at the very beginning.

Q. Are you saying that all of your negro defendants have never wanted any negroes on there?

A. I have never had a colored defendant to want a colored man on his jury.

Q. What about your civil cases?

A. When I am working on a fifty percent basis I consider my judgment there and I never ask anyone. I strike myself. If I am working on a fifty percent or a thirty-three and a third I do my thinking there.

Q. In other words, when you work on a contingent fee basis you don't ask your client nothing?

[fol. 29] A. I don't ask them nothing.

Q. You have never had any negro serving on a civil case that you have tried?

A. I never have. But it was my choice that I did not have. There were no rules to keep me from it.

Q. What is the smallest number that you have ever seen on a venire drawn for the trial of a case where at the same time you were representing the plaintiff or the defendant in a civil case. What is the largest number you have ever seen on a venire?

A. What, of colored people.

Q. Just the venire itself?

A. I don't know.

Q. Have you seen as small a number as fifty five on a venire?

A. In civil suits?

Q. Yes.

A. That again I will say I don't know.

Q. In your best judgment what is the smallest number you have seen, after everyone has been excused?

A. After everyone has been excused I have seen as low as, probably forty. After everyone has been excused on a civil suit, in this county.

Q. Can you recall the last situation you had of that nature?

A. No, I can't.

Q. Have you tried any civil cases this year?

A. I think we have had one term of civil court this year

if I am not mistaken. I think we have cancelled the rest of them. I don't know.

Q. Have you tried any civil cases this year where a petit jury was involved?

A. If we have had a term of court this year I have, and I am sure we have had one.

Q. Can you recall the last civil case you tried?

A. Yes, I recall the last civil case I have tried. Yes, I have tried about six or seven or maybe eight this year. I remember very well the last one.

Q. Was the last one you tried involving a negro or a white person?

A. It involved whites.

Q. Have you tried any for negroes this year?

A. No, I believe the last civil case, the last jury case I tried for a negro was last year, I believe. I don't know.

Q. Give your best judgment as to the number of persons constituting that particular venire?

[fol. 30] A. I don't know. Fifty or sixty.

Q. Were any negroes on that venire?

A. I don't know.

Q. You don't recall?

A. I just don't remember.

Q. You don't remember anything.

Do you remember any case that you tried last year for a negro in a civil case?

A. Yes, I remember two I tried last year.

Q. Can you remember the venire drawn?

A. No, I can't remember the venire.

Q. Can you remember whether or not there were any negroes serving on the venire in any civil case you tried last year?

A. I can't remember, but I'll put it this way. I can't remember, but in my best judgment there were negroes on the venire of all of those last year, but I can't remember specifically. I can't remember trying a case in Talladega County in the last—well, since Harry Teel reshuffled the jury box, that there not at least a few negroes on the venire.

Q. At least a few?

A. That is right. At least, a few.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. Do you remember when this Guy Handley trial was held?

A. It was during John Robinson's administration the last year he was in office.

Q. That was about four years ago?

A. About four years ago.

Q. It has been since this Miller case?

A. Oh, yes.

Q. I believe you told the lawyer that there were eleven members of the negro race on that particular venire?

Mr. Billingsley: I am going to object to what he told the lawyer.

Q. I am talking about you.

Mr. Billingsley: I thought you were talking about another lawyer.

A. There were eleven on it.

Q. That is all.

(Witness excused.)

[fol. 31] **BYRON D. BOYETT:** The next witness called, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name to the court please?

A. Byron D. Boyett.

Q. Mr. Boyett, where do you live?

A. 4104 Brecon Circle, Talladega, Alabama.

Q. What is your profession?

A. I am a lawyer.

Q. How long have you been engaged in the practice of law?

A. Since June of 1948.

Q. Do you have any specialty or are you engaged in the general practice of law?

A. The general practice of law.

Q. Do you handle both civil and criminal cases in this county?

A. Primarily civil, some criminal, I have handled some criminal cases.

Q. Have you handled many cases in which you were trying them before a petit jury?

A. Yes.

Q. Have you ever tried a case either in the civil division of the court or the criminal division of the court on which there was a negro sitting as a member of the petit jury?

A. Not as a member of the petit jury as struck.

Q. You have never tried a case in which a negro served on a jury in this county?

A. Well, they were on the venire.

Q. I am talking about the petit jury?

A. Not on the actual trial of the case.

Q. Have you ever seen any?

A. No.

Q. That is all.

Cross examination.

Mr. Hollingsworth:

Q. Have you had occasion to observe the venire that was qualified by the court to sit as jurors in the particular cases on trial?

A. Yes.

Q. Were there colored members of that particular venire?

A. I do not recall a jury list that did not have colored members on the jury venire.

Q. Did the number of colored jurors on these particular venires, did they vary from time to time?

[fol. 32] A. Yes.

Q. In other words, there wasn't any uniform policy of having two, four or six or eight at any one particular time, to your knowledge, was there?

A. No.

Q. Were you present when this last grand jury was em-

paneled that returned the indictment against the defendant in this case, Robert Swain.

A. I was not present when the jury was empaneled. I was present in the courtroom when the jury came in to make its report and I observed the grand jury several times in passing back and forth through the courthouse.

Q. Do you know, of your knowledge, whether or not there were any members of the negro race on that particular grand jury?

A. Yes.

Q. How many?

A. In my recollection, two. I may be mistaken.

Q. I believe that is all.

Redirect examination.

Mr. Billingsley:

Q. How many persons make up a grand jury, Mr. Boyett?

A. How many make up a grand jury.

Q. How many members do they have on a grand jury?

A. Eighteen members.

Q. Do you know whether or not any negroes were on the grand jury prior to the grand jury that met which indicted this defendant?

A. I do not recall a grand jury, of my own personal knowledge, in several years, that didn't have a negro on it.

Q. A negro.

A. That did not have members of the colored race on the grand jury.

Q. Now, what is the largest number you have ever seen serving on a grand jury in this county?

A. Three would be my best judgment.

Q. You say you do not recall a venire in which there were not negroes on that venire?

A. I said I do not recall in which there were not members of the colored race on the venire and quite often.

Q. What is the highest number you have seen on a venire [fol. 33] organized for the purpose of trying civil cases.

A. It is not unusual to have six or eight or ten.

Q. When was the last time you saw ten?

A. Orzell, I don't know when was the last time.

Q. In your best judgment?

A. When I saw ten?

Q. Yes.

A. That was a mere estimate. I couldn't testify positively that there have been exactly ten on any venire.

Q. Have you ever seen as many as ten on a venire?

A. In my best judgment, yes.

Q. When, was it last year?

A. I could not tell you.

Q. Have you seen as many as eight?

A. Yes.

Q. When did you see eight?

A. Oh, very seldom we have less than five or six. I would say that in my judgment within the last year there have been several occasions in which there has been seven or eight on the venire.

Q. Do you recall any particular instance when you have seen as many as eight?

A. No.

Q: Can you take a venire, Mr. Boyett, you usually get the venire before the term of court starts, don't you?

A. That's correct.

Q. Can you take that venire and go down it and tell whether or not those listed thereon are negro or whites?

A. I cannot. If I saw Orzell Billingsley on there I would think he was a white person because I never saw a colored person by that name before.

Q. Couldn't you look at my address and tell?

A. Not all the time. Sometimes you can tell.

Q. If I lived on a certain part of Battle Street you would know?

A. Not necessarily.

Q. Well, if I lived in some other—I am not familiar with all the areas here.

A. Dr. Bross up there is a white person. There are a number of white people up there.

[fol. 34] Q. Let me ask you, Mr. Boyett. Is this county divided into precincts or beats? How is this county divided for voting purposes?

A. It is divided into beats and precincts.

Q. You have your precincts and then you break it down into your beats?

A. You have beats. The county is divided into beats.

Q. And the beats are divided into precincts?

A. That's right.

Q. Do you know how many beats there are in this county?

A. Let me see. Eighteen. I am not sure that is not the last one.

Q. Are there any precincts in this county where you have negroes only?

A. No, not that I know of.

Q. You don't know of any precincts in this county where there are nothing but negroes?

A. What do you have reference to? Property is assessed by beats. Are you talking about property assessment?

Q. Maybe I can ask my question this way. In Birmingham, our county is divided into precincts. We have 27 precincts. Then the precincts are divided into districts. We have 117 districts. There are some districts you only have negroes. I am wondering whether or not in this county you have a beat, assuming that your beat is similar to our district, do you have any beats in which there are only negroes?

A. No.

Q. Do you have any beats in which there are—they are predominantly negro?

A. Not to my knowledge, any beats that are predominantly negro.

Q. That is all.

(Witness excused.)

GEORGE F. WOOTEN : The next witness called, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley :

Q. State your name to the court please?

A. George F. Wooten.

Q. Where do you live, Mr. Wooten?

A. 412 First Street, Talladega, Alabama.

Q. What is your profession?

A. I practice law.

Q. Do you engage in a particular phase of law or are you in the general practice?

[fol. 35] A. Generally a general practitioner, although I try very few criminal cases.

Q. Most of your work is civil work?

A. That's right.

Q. Have you tried any civil cases in which there were negroes serving on the petit jury?

A. Do you mean after the jury was struck?

Q. After the jury was struck?

A. No.

Q. Have you ever been present when any petit jury was organized on which there was a negro serving as a juror?

A. After the jury was struck?

Q. Yes.

A. No.

Q. That is all.

Mr. Hollingsworth: No questions.

(Witness excused.)

PHILLIP SMITH: Called as the next witness, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name to the court please?

A. Phillip H. Smith.

Q. And what is your address?

A. 404 Oak Street, Talladega.

Q. That is in Talladega County, Alabama.

A. Yes.

Q. What is your profession?

A. I am an attorney.

Q. How long have you been engaged in the practice of law?

A. Four years this June.

Q. Are you engaged in any particular phase of law?

A. No, general practice.

Q. Have you handled criminal cases?

A. A few.

Q. Have you handled many civil cases?

A. A fair number.

[fol. 36] Q. Do you represent both negroes and whites?

A. That's correct.

Q. And you have represented both negroes and whites in cases in which there was a jury, both civil and criminal?

A. I don't believe I have ever tried a jury case, a criminal case with a negro client.

Q. That is not what I asked you.

You say you have never tried a criminal case with negroes serving on the jury?

A. No, I said with a negro client.

Q. On a petit jury.

A. I may have been answering the wrong question.

Q. Let me ask you this question. Have you ever tried a criminal case on which a negro was sitting on the petit jury?

A. As struck, no.

Q. Do you know whether or not any lawyer in this county has ever tried a civil or criminal case on which a negro was serving on the petit jury to your knowledge?

A. I have no personal knowledge of any negro sitting on a petit jury in Talladega County.

Q. Have you ever been present when a grand jury was organized?

A. No.

Q. Have you ever been present when they reported to the court?

A. No.

Q. Have you ever been present when the members that constituted a venire was in court?

A. For the organization of the petit jury, yes.

Q. Have you observed any negroes on the venire?

A. On several occasions.

Q. What is the largest number of negroes you have ever seen on a jury venire in this county?

A. As the venire finally boils down, after excuses and everything, we generally have 35 or 40 to strike from, and usually, just as an average, there are usually six or seven negroes left on the venire.

Q. When did you see a venire with six or seven negroes on it?

A. I couldn't give you a specific date.

Q. You can fairly well recall this years venire, can you not?

A. I don't believe I was present for that term of court.

Q. Have you tried any civil cases this year?

[fol. 37] A. No.

Q. You say you have seen as many as six or seven negroes on the jury venire?

A. To my recollection that last one I observed last year had six or seven members.

Q. Was that on one or on many venires?

A. On each one I saw in my best judgment.

Q. And you say 35 or 40 members were left on the venire after excuses?

A. I would say usually 35 to 40.

Q. Those were the ones left after excuses took place?

A. That is right, people here eligible to serve, that wanted to serve.

Q. Do you usually come to the clerk's office and pick up a venire?

A. Usually I go and get it ahead of time.

Q. What is the largest number you have seen on the venire?

A. It starts out pretty big. Sixty-seven-or eighty.

Q. Does it sometimes have as many as 90 on it?

A. On a capital case it does.

Q. Let's take the last venire you observed. Can you recall that, in which you tried a civil case?

A. I can't recall that specific venire.

Q. Can you recall any in the last year?

A. I couldn't recall any specific venire.

Q. Can you look at a venire and tell whether those persons listed thereon are negroes or white?

A. Usually not. I will know some of them.

Q. Do you keep your venires from term to term?

A. I usually do keep a copy.

Q. Have you kept your venire lists for the last two years?

A. No, I don't keep a copy unless I have a case involving that venire and then I will have a copy in my file.

Q. Do you know of any lawyer in this jurisdiction who keeps all venires?

A. No, I sure don't.

Q. What attorney in this district is noted for civil work? In jury cases?

A. What do you mean, for frequency in court or experience?

Q. Yes.

A. Well, Love and Boyett and Wooten and Gaines, in this end of the county.

Q. When you mark your venire, do you list on there whether or not the person named is a negro or a white [fol. 38] person, do you write that down?

A. Usually I do, when the clerk first calls the roll.

Q. When the venire comes out for the next week of court and if you have a jury case do you go over the list that you have kept, the jury list and check them?

A. Not the jury list. I keep a file of people who have served on juries in civil cases and I study my file.

Q. And by studying them you can check those names and tell whether that person is white or colored?

A. No, these records will not come from the venire but from the decisions on file in the clerk's office where I have my secretary make the record for me. Those records don't show whether they are white or colored.

Q. What records are you talking about?

A. My records come from the records in the clerk's office.

Q. Do you mark down whether that is a white or colored person?

If your venire comes out today, you can take it to your office and if you saw the name of a person on there that was previously on a jury you would know whether he was a negro?

Mr. Hollingsworth: We object to that.

Mr. Billingsley: If your Honor would permit me to tie that up later.

I asked whether or not he can take a venire or a jury list put out by the Clerk of this court and take it to his office and if there existed the name of a negro on that venire that was on a venire last year, he could check that and determine whether John Doe was a negro or white?

A. If it was a name that appeared on a venire previously on which I had a case to try, I would have that record. If it were not, I would not have a record whether it was a white or colored man.

Q. Have you made a study of the venires you keep?

A. Not as a study of venires.

Q. That is all.

Mr. Hollingsworth: No questions.

(Witness excused.)

* OTIS R. BURTON, JR.: The next witness called, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

[fol. 39] Q. State your name please.

A. Otis R. Burfon, Jr.

Q. Mr. Otis R. Burton, Jr.

A. Yes.

Q. Where do you live, Mr. Junior, I mean Mr. Burton.

A. 713 Maple Drive, Talladega.

Q. As a matter of fact, you are a judge, are you not?

A. Intermediate Court judge, yes.

Q. Judge, I'll ask you, how long have you been engaged in the practice of law?

A. I have been practicing law here for several months over five years.

Q. Are you saying that you have not been here all the time?

A. Yes, I have. I started practicing in February, 1957.

Q. Have you had occasion to represent persons, both in criminal matters and civil matters?

A. I have.

Q. Have you had any criminal cases?

A. Not very many. I would say a few.

Q. You have had some?

A. I have had some, yes.

Q. Have you ever tried a case, a criminal case before a petit jury in which there was a negro sitting on that jury?

A. Not sitting on the jury, no.

Q. Have you ever tried a civil case in which a negro was sitting on the petit jury?

A. No.

Q. Have you ever been present when a grand jury was organized?

A. I have never been present.

Q. Have you ever been present when they reported?

A. No.

Q. Have you ever been present when the men selected or drawn to constitute a venire came to court, you have, have you not?

A. Yes.

Q. Have you ever observed any negroes on those venires?

A. I have.

Q. What is the highest number of negroes you have observed on a venire?

A. My best judgment would be approximately six to seven on the venire.

[fol. 40] Q. What would be the lowest number you have ever seen?

A. Probably two.

Q. Have you seen as many as just one?

A. I don't recall having seen just one.

Q. When did you last see seven?

A. My best judgment is it was in 1959 I believe.

Q. When did you last see six, have you ever seen six or as many as six?

A. Yes, I have.

Q. When did you last see six?

A. I don't recall exactly when.

Q. Have you seen six within the last year?

A. I think so.

Q. How many have you seen on a venire this year, the largest number?

A. I believe on the venires I have observed this year there may have been four on one occasion.

Q. When did you see the last person called for jury duty in this courtroom or when did you try a case last?

A. I haven't tried any criminal cases since I was appointed Intermediate Court Judge. I believe I had a court appointed case the latter part of last year.

Q. A criminal case?

A. Yes.

Q. All right. Do you remember that venire? Do you remember seeing negroes on that one?

A. In my best judgment there may have been approximately four on it.

Q. Did you know those four negroes who were on that venire?

A. No.

Q. Have you seen those negroes on any other venire prior to that time, those same negroes?

A. Not to my knowledge.

Q. I believe that is all.

Mr. Hollingsworth: No questions.

(Witness excused.)

[fol. 41] RALPH D. GAINES: The next witness called, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name please?

A. Ralph Gaines.

Q. What is your address, Mr. Gaines?

A. I live on the New Shocco Road, here in Talladega.

Q. Are you engaged in the general practice of law?

A. Yes, I am.

Q. How long have you been engaged in the general practice of law?

A. Thirteen years.

Q. Have you had occasion to try criminal cases in this county?

A. Yes, I have.

Q. Have you tried a great many criminal cases? In which a jury was involved?

A. A fair number or a good many.

Q. Have you ever tried a case, a jury case in a criminal matter in which a negro was sitting on the petit jury?

A. No, never have.

Q. Have you ever tried a civil case in which a negro was sitting on a petit jury?

A. No.

Q. Have you ever been present when the grand juries were organized in this county?

A. I have been in the courtroom here when the members of the grand juries were selected on maybe one or two occasions.

Q. Have you observed whether or not negroes were on those grand juries on those one or two occasions?

A. I remember one occasion when I believe there were three negroes on the grand jury and another when there were two negroes on the grand jury.

Q. Those are the only occasions that you recall?

A. The only ones that I recall at this time.

Q. On the occasions that you have had to try civil matters, did you observe any negroes on the venires that were sworn to try causes?

A. Yes.

Q. What is the largest number of negroes you have ever observed on a venire?

A. I believe this year in civil cases we have had a venire with as many as—I don't remember the exact number, but I would say six or eight, at least.

[fol. 42] Q. You have seen six or eight this year?

A. This year.

Q. Do you remember the occasion? Were you trying cases at that time?

A. I tried two or three cases.

Q. Were you trying a case at the time when you saw the eight on the venire?

A. I say again, I am not positive at the number, that it was eight, but I would say in my best judgment somewhere around six or eight were on there.

Q. Could it have been as many as five?

A. No, I believe it was more than five. I think there were six or eight.

Q. You don't recall more under any circumstances than eight, but you don't recall when you saw that eight, do you?

A. It was since the first of January of this year.

Q. I see.

A. At our last civil jury term of court.

Q. Do you make a practice of keeping the venires of jury list that is put out by the clerk after the names are submitted to him?

A. Yes.

Q. You keep that in your office, do you ~~not~~?

A. Yes.

Q. Do you usually have an agreement with the lawyers to strike negroes from the jury list?

A. I didn't understand the question.

Q. Do you usually enter into an agreement with lawyers or the lawyer on the other side to strike negroes from the jury list?

A. I have struck negroes from jury lists. I have talked with negro clients about negroes serving on juries and they have been struck in all the cases that I have ever tried in this county.

Q. You say you have talked with negro clients?

A. Yes.

Q. And you are saying that negro clients want those negroes taken off the list?

A. I have had several negro clients tell me that they wanted negroes taken off of the jury.

Q. Have you ever had any negro clients that stated that they wanted the negroes on the jury?

A. I don't believe I ever have had that.

[fol. 43] Q. Have you ever had any who refused to let you attempt to put some on the jury?

A. Refuse to let me attempt to put them on a jury!

Mr. Hollingsworth: We object to that. That is calling for a mental conclusion or operation, he is talking about what his client does when he is attempting to do something.

Q. Let me put the question like this.

Have you had any negroes—have all of your negro clients request that you strike negroes from the jury? Have all of them done that?

A. So far as I can recall, yes.

Q. All of them have done that?

A. Yes.

Q. Have you had any who didn't do it?

A. Well, if all of them did, I am sure there were none that didn't.

Q. I see. Now, have you ever entered into an agreement with the lawyer on the other side to strike negroes from a jury list?

A. There have been occasions when we have struck them.

Q. Have you and the other lawyer agreed to strike them from the list?

A. Yes.

Q. What is the smallest number you have seen on a venire after all got excused; after those who wanted excused—what is the smallest number you have seen left to be chosen from?

A. After everyone had claimed exemption or been excused?

Q. That's right.

A. I would say three or four. After both white and colored had been excused or claimed their exemptions.

Q. And how many were left on the venire?

A. You mean colored?

Q. White? And colored?

A. Oh, 35, thirty or thirty-five or forty.

Q. And you say generally there are about three negroes left?

A. Three or four.

Q. Do you recall an occasion, a recent occasion when that happened, when you had a list?

A. Yes, I believe we had a civil term of court here in February when there were three or four.

Q. Do you recall how many persons names were listed on the particular venire, your best judgment? Would you [fol. 44] say as many as 70?

A. No.

Q. 60?

A. No.

Q. Fifty?

A. No. I would say somewhere between thirty and thirty-five men were left after all—

Q. How many were on there before they excused anyone?

A. Before excuses and before exemptions were claimed?

Q. Yes, that is right!

A. Somewhere around sixty.

Q. So nearly 25 persons were excused or claimed exemptions, is that right?

A. That's right.

Q. What percentage of those were negroes that were excused or claimed exemptions?

A. This is all a matter of judgment. I haven't checked my records or even thought about this situation before. But I would say that approximately half of the negroes who were exempt.

Q. Could I get you to check your records and we call you back later?

A. It would take a long time. I don't know what case you are referring to.

Q. Your Honor, we will excuse this witness now and call him back later.

The Court: Do you understand what it is you are going to do?

A. No, I don't. I am trying to find out before I leave here. I don't know what you want me to check.

Q. Well, I would like to see the lists that you have kept for the last year?

A. Do you mean on striking juries? I am not even sure I have lists. I have card index files on people who have served on juries, as some of the other lawyers have.

Q. Does your card index file show whether they are negroes or whites?

A. No.

Q. When you get ready to strike a jury do you mark on the list that you have whether a person is a negro or a white person?

A. No.

Q. And you can't tell whether a person is a negro or white person?

A. Not unless I know them personally by name.

Q. Do you have a wide acquaintance among negroes in this county?

A. I know a good many negroes, yes.

[fol. 45] Q. You can generally look at your list and tell whether they are white or colored by the address and name too, can't you?

A. Not necessarily, the address would be only Talladega or Sylacauga.

Q. But generally you can, can't you?

A. I may see one or two names on a venire that I know are negroes but that would be the limit.

Q. Your cards do not show whether that person is white or negro?

A. No.

Q. What have you done with your jury list. You don't have that now?

A. I don't keep those after I make up a card index on it.

Q. Do you know anyone who does?

A. Keep the jury list?

Q. Yes.

A. No, I don't.

Q. That is all.

Mr. Hollingsworth: No questions.

(Witness excused.)

C. G. DARDEN: The next witness called, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name please?

A. C. G. Darden.

Q. Where do you live, Mr. Darden?

A. Sylacauga, Alabama.

Q. Is that in Talladega County, Alabama?

A. It is.

Q. What is your profession?

A. Merchant.

Q. Are you chairman of the Jury Board of Talladega County, Alabama?

A. Yes.

Q. How long have you been chairman of the Jury Board?

A. Since 1959.

Q. Who was chairman prior to that time?

A. I don't know.

Q. Had you served on the Jury Board prior to that time?
[fol. 46] A. I had not.

Q. What are the names of the other persons on the jury board?

A. Mr. Ellis and Mr. Moody.

Q. Do they live in Talladega County, Alabama?

A. They do.

Q. How long have they been members of the Board?

A. The same time. We all went in at the same time.

Q. Have either of the other members of the Jury Board served on the board previous to 1959?

A. Not to my knowledge, I don't know.

Q. Do you know the names of any other members of the jury board, names of other persons who served on the jury board prior to 1959?

A. I do not.

Q. You were asked—I believe we had you served with a subpoena duces tecum to bring the jury roll and jury list and jury box?

A. No, I didn't.

Q. You did not get a subpoena?

A. No. I got a subpoena. I did not bring it for I have no authority to bring it. The law will not give me any authority to handle the box except when we refill it twice during the administration.

Q. What about the jury roll?

A. That is not in my possession. That is in the clerk's possession.

Q. The clerk has the jury roll?

A. Yes.

Q. Is the jury roll ever in your possession?

A. No more than in our office when we are working on it.

Q. Does the clerk have full authority over the jury roll?

Mr. Hollingsworth: We are going to object to that. He is getting into matters of law, as far as full authority over the jury roll. That is too indefinite and too broad.

The Court: I'll sustain the objection.

Q. What authority, if you know does the clerk of the jury board have over the jury roll?

A. The jury roll?

Q. I said, what authority, if any, does the clerk of a jury board have over the jury roll?

[fol. 47] A. The clerk keeps the roll. We tell her to. We fill the box, that is all we have to do.

Q. You help to fill the box?

A. I help to get up the names.

Q. What method do you use in getting the names to put on the jury roll?

A. Well, there is lots of ways of getting it, knowing the people or working with them and the phone book and the city directory and just any way of getting the names and checking on them.

Q. What method do you use in getting the names to place on the jury roll?

A. Well, I have been there thirty years, and I have been among people. I know a lot of them.

Q. What method do you use to get the names to place on a jury roll?

A. Well, first he has got to be over 21 and he has got to be in good health, and never been convicted of a—

Q. (interrupting) That Mr. Darden is a qualification. I am asking the method that you use to place names on a jury list?

A. Well, I go out into the community and with a list of names or roll and check on them.

Q. Did you go into all the beats?

A. I don't have all the beats. I don't have but Sylacauga and Sycamore and Winterboro.

Q. I mean you are Chairman of the Jury Board of the county, aren't you?

A. Oh, yeah.

Q. That includes the entire county, doesn't it?

A. I think so.

Q. Are you acquainted with your duties as Chairman of the Jury Commission?

A. No more than what the law says.

Q. What is that?

A. Well, to put in qualified jurors.

Q. What kind of qualified jurors? Is that the only duty you have?

A. Well, we have to refill the jury box every two years.

Q. How do you refill it?

A. We have the names and we check on them and go through them.

Q. Do you use a registration list to fill the box? The registration list for voters, do you use that?

[fol. 48] A. Oh, no.

Q. You don't use that?

A. Well, you can. I had a registration list in one of the beats, but in my beat—

Q. (interrupting) What beat did you have a registration list in?

A. Winterboro, I don't know what beat that is.

Q. Do you have a voters list in your beat?

A. No.

Q. Why didn't you have a registration list in the other beat?

A. I didn't know the people up there too well.

Q. You just got the one beat?

A. Yes.

Q. What beat was that?

A. I don't know what beat Winterboro is in.

Q. Where is that beat located?

A. Between here and Sylacauga.

Q. Is it in Sylacauga?

A. No, it is out in the country.

Q. Is it in this county?

A. Yes.

Q. It is not within any city?

A. No, no city, just rural.

Q. Have you ever gotten a registration list for beat five. Do you know where Beat Five is located?

A. No. Where is it?

Q. Do you know?

A. No.

Q. Do you know how many beats there are in this county?

A. No.

Q. Does the clerk of the jury board visit these beats?

A. Not necessarily.

Q. Does she do it. Does she visit these beats for the purpose of getting names to place on the jury roll?

Mr. Hollingsworth: We object to that. That would be immaterial.

The Court: I'll overrule.

A. What was the question.

[fol. 49] Q. Does the clerk of the jury board visit each beat in the county for the purpose of compiling the jury roll?

A. Does the clerk?

Q. Yes, sir.

A. I don't know. You see, she is up here all the time. I don't know whether she does or not.

Q. Do you meet often as members of the jury board?

A. Oh, twice a year.

Q. When was the last time you met?

A. Oh, back this month. I don't remember the day.

Q. And do you—I am trying to clear up a matter here. I am trying to find out how you go about getting names for the jury roll. Do you take the city directory?

A. I have it, yeah.

Q. Do you use that for the purpose of getting names for the jury roll?

A. Well, partly and partly not. I usually talk to different ones in the community about who would make good jurors.

Q. Do you talk with any negroes about who would make good jurors?

A. I talked to one last Saturday.

Q. How many negroes have you talked with—when was this last jury roll compiled?

A. Last October.

Q. How many negroes have you talked with for the purpose—

A. I wouldn't know for I am associating with them all the time. I make it my business to talk with them whenever I run into them, and getting up names.

Q. What do you mean, when you see them on the street?

A. Not necessarily on the street.

Q. Do you call any?

A. No. They are in the store and out of the store.

Q. In the store you say?

A. Yeah.

Q. And you write their names down?

A. Yeah.

Q. Do you make any other kind of contact for the purpose of placing the names of negroes on the jury roll?

A. Well, no different than the whites. There is no discrimination.

Q. What do you do to get the names of whites on a jury roll?

[fol. 50] A. Well, I do the same thing.

Q. What?

A. I talk to different ones around and about.

Q. The only way you get names—

Mr. Hollingsworth: Now, we object to this. This is his witness. He is cross-examining him. He is not giving this man an opportunity to answer the questions.

Q. I'll withdraw that.

Now, what method do you use to place the names of whites on this jury roll?

A. Well, I check with different ones and I know worlds of them. I have been there all my life.

Q. Do you check with the tax assessor's office?

A. No, this is not a qualification.

Q. I said for the purpose of getting names?

A. No.

Q. Do you know what your duties are as far as placing the names of persons on the jury roll?

A. Well, I think so.

Q. What are they? Name some of them?

A. Well; first you have got to be over 21, you have got to be in good health.

Q. Not the qualifications—your duties as a member of the jury commission?

A. No more than just to find out about the people and to satisfy myself and the board that would make a good juror.

Q. That is the only method?

A. I don't know right off.

Q. Do you know whether or not the law requires you to put a certain percentages of persons on the jury?

A. No, it doesn't.

Q. Do you know what the law requires you to do?

A. Well, there are no percentages.

Q. Are you acquainted with the fact that the law requires you to put the names of all qualified persons on the jury roll within your county?

Mr. Hollingsworth: We object to that particular question.

Q. You are chairman of the jury board?

A. Yes.

Q. And the question I asked you is whether or not the [fol. 51] law says that you are supposed to put the names of all qualified male citizens in the county on the jury roll?

A. Well, it doesn't specify that they all have to be on it.

Q. What does it specify?

A. It doesn't say anybody over 21—

Q. Does it give you the authority to determine how many people should be put on there?

Mr. Hollingsworth: We are going to object to that, may it please the Court, that is the purpose of this inquiry. He is invading the province of the court by that question. He is attempting to impeach his own witness.

Mr. Billingsley: If your Honor please, I am not trying to impeach my own witness. He is a member of the jury board and as such he no doubt is acquainted with his obligations and duties as relation to the operation of the jury board.

The Court: I'll sustain.

Q. When was the last time you filled the—rather, compiled the jury roll?

A. Last October.

Q. Do you remember how many names were placed on the jury roll?

A. No.

Q. Do you have any idea how many names?

A. I don't. I don't have any idea.

Q. Have you ever checked it?

A. No more than just looking over it and marking out the ones that are deceased and moved—

Q. You do that?

A. Oh, yes, when we meet for that purpose each two years.

Q. Do you keep a card system of the names of persons placed on the roll?

A. No. I don't.

Q. Where did you get those names on the jury roll from? I am not talking about whether you get them from a house or a store, but do you take it off some other type of paper and write it on there?

A. The clerk does.

Q. Where does she get those names?

A. From the names we turn in.

Q. That you turn in?

A. Yes.

Q. Do you compile a list before you compile the jury roll?
[fol. 52] A. Well, a list of the new ones we bring in.

Q. Now, do you put the same names on there each year if they are living?

A. No, we add to it each year. There are some moving out and dying and getting out. You have to add to it each two years.

Q. But generally if you compile it every two years, are those persons who are already listed on the jury roll, if they are qualified, they remain on there?

A. Yes.

Q. Then you add some more names to it?

A. That's right.

Q. Do you have any idea how many names you added to it last October?

A. No, I don't. We just add what we could get up and what we have.

Q. Do you have the names of negroes on the jury roll?

A. We do.

Q. How do you know?

A. I know some negroes. And I put them in there.

Q. Do you remember how many you put in there last October?

A. No.

Q. Did the other members of the jury board put some in there?

A. Well, they said they did and I think they did. I am sure so.

Q. You are certain of that?

A. Yeah.

Q. Would you be able to go through the jury roll and determine the names—let me ask you, I'll withdraw that.

Do you have a wide acquaintance among negroes in this county?

A. No more than in my town, no Talladega negroes.

Q. You only know negroes in Sylacauga?

A. Yes.

Q. Have you placed the names of negroes from Sylacauga on there?

A. Yes.

Q. Are you acquainted with the population ratio in Sylacauga between whites and negroes?

A. No.

Q. Is it fifty-fifty in your best judgment?

A. No, I wouldn't think so.

Q. You have more whites there than you do negroes?

[fol. 53]. A. I think so.

Q. Have you ever been present in court when the Judge draws the names from the box for the purpose of making a venire?

A. No, never have.

Q. Do you know whether any of the other members have been present?

A. No, I don't.

Q. Have you ever been present on the trial of any case in this court?

A. Oh, yes.

Q. Have you ever been present when a jury was sitting over in the box there?

A. Yeah.

Q. Have you ever observed a negro serving on a jury?

A. No negroes.

Q. Have you had any knowledge of a negro having served on a jury? In this county?

A. The grand jury. I have sat with them some on the grand jury.

Q. I am talking about petit juries?

A. No.

Q. You have been on the grand jury?

A. Yes.

Q. How many grand juries have you sat on in the last four years?

A. None.

Q. When was the last time you served on the grand jury?

A. It has been about six or eight years.

Q. Were any negroes serving on the jury then?

A. On the grand jury, yes.

Q. How many?

A. Two.

Q. Have you served on the grand jury at any other time?

A. Yes, I have.

Q. If I would show you the jury roll and ask you to observe it would you be able to go through there and determine whether or not some of the names listed thereon would be a white person or colored person?

A. Well, I wouldn't know the difference just looking at the names.

Q. Could you tell by the addresses?

A. Well; some few. They are all mixed up. There are negroes and whites living everywhere.

[fol. 54] Q. You yourself have never visited any beat for the purpose of getting names to place on a jury roll?

A. Never visited?

Q. Visited a beat?

A. I have, yes. My beats, the ones I was working in.

Q. That is the only ones you have ever visited?

A. Yes. That is the only ones.

Q. I asked you a few minutes ago if you were acquainted with Beat Five. Beat Five is out by Talladega College. Do you know where that beat is?

A. I know where Talladega College is. I don't know what beat it is in.

Q. Do you list the names of persons listed on the jury roll by addresses and by beats?

A. By addresses and occupations.

Q. You don't have it by beats?

A. No.

Q. I would like to excuse this witness, your Honor until such time as we can get the jury roll from the clerk.

Cross-examination.

Mr. Hollingsworth:

Q. I believe you testified that as a merchant in Sylacauga that you have wide knowledge of the citizens there, both white and negro?

A. For 33 years, ever since I have been grown.

Q. For the record approximately what size town is Sylacauga?

A. I would say eight or nine thousand. I think that is it. I wouldn't be positive.

Q. And where is your store located, somewhere around the center of town?

A. On Broadway.

Q. I believe you testified that you did visit or take a poll list and go up into the Winterboro beat. Now for the record, that lies between Sylacauga and Talladega, does it not?

A. It does.

Q. Mr. Moody is from the Childersburg beat?

A. Yes, sir.

Q. Then Mr. Ellis, the other member of the Board is from North Talladega County is he not?

A. Yes, sir.

Q. Do you gentlemen go out on your own, or did you go out on your own and make an investigation into these people's names that were turned in to the jury commission? [fol. 55] A. I did.

Q. Were these names turned over to the jury commission when two or more of its members were present?

A. They were.

Q. Was Mrs. Asa Young, Mrs. Elizabeth Young, is she the clerk of the jury commission?

A. She is.

Q. She actually did the stenographic work, that is typing and making up of the jury cards and putting the names on the book, did she not?

A. She did.

Q. I believe you testified that you all had filled the box last October, 1961, and that was the last time the box was filled?

A. The last time I have seen the box, yes, sir.

Q. Then had you had—then had one been filled two years prior to that time?

A. Yes, the first week in October.

Q. The names that you turned in to the jury commission to be placed in the box along with the men's names that you checked that were already on these lists?

A. Yes, sir.

Q. That is sometime before that?

A. Yes.

Q. Did you check them as to their reputed honesty?

A. I did. So far as I could find.

Q. And to their intelligence?

A. Yes, so far as I could find.

Q. So far as their reputation in the community for integrity?

A. Yes, sir.

Q. Good character?

A. I did.

Q. And sound judgment?

A. Yes, sir.

Q. Did you take into consideration the people who had reputation for being an habitual drunkard?

A. I did.

Q. Did you take into consideration the people who had been convicted of crimes involving moral turpitude?
[fol. 56] A. Yes, I did.

Q. And people who were physically unable or incapacitated?

A. I did.

Q. Did you use any different manner in selecting negroes' names for the box than you did white names?

A. I did not.

Q. In other words, you employed the same manner in selecting the members of each race?

A. I did.

Q. I believe that is all the questioning at this time.

Redirect examination.

Mr. Billingsley:

Q. Mr. Darden, you have acquainted yourself with your duties as a jury commissioner, have you not?

A. I have tried to.

Q. And also the duties of the clerk?

A. I know her duties.

Q. I would like to read you part of Title 36, Section 18 of the Code of Alabama and ask you if you are acquainted

with this: that "the jury commission shall make in a well bound book a roll containing the names of every male citizen living in the county who possessed the qualifications prescribed in the statute." You are familiar with that?

A. Well, I read it.

Q. You are also familiar with the fact that the jury commission shall place on the jury roll and in the jury box the names of male citizens of Talladega who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment?

A. I am.

Q. Now, what methods did you use to determine whether or not negroes were honest and intelligent and esteemed in their community for integrity, good character and sound judgment?

A. The same method that I used for whites.

Q. What is that?

A. I circulated among them and talked about them and talked with them and done business with them.

Q. You talked with the negroes?

[fol. 57] A. Yes.

Q. You talked with every negro?

A. No. Not every negro, but I have talked with just plenty of them.

Q. Name some negroes you know on the jury roll?

A. Well, I would have to see the roll.

Q. You don't recall any now?

A. No.

Q. You talked with every negro. Did you talk with them personally?

A. Not every one personally.

Q. What method did you use to determine whether or not a negro had been convicted of a crime involving moral turpitude or was a habitual drunkard?

A. The first things I found out about was his character.

Q. How would you do that?

A. I would ask some other negro.

Q. Did you have a special type of negro you asked?

A. Well, no more than just a regular negro in the community.

Q. If you found out about a negro in beat five would

you ask somebody about that negro? In Beat Five out by the college?

A. Well, that was Mr. Ellis. He was working that territory and I had no reason to be in Beat Five.

Q. In other words, you divided the territory?

A. Yes.

Q. And you would take some of it and Mr. Ellis would take some of it, is that right?

A. Yes.

Q. We will excuse this witness until later.

(Witness excused.)

ELIZABETH YOUNG: The next witness called, having been duly sworn, testified as follows:

Direct Examination,

Mr. Billingsley:

Q. State your name?

A. Mrs. Elizabeth Young.

Q. Where do you live?

A. At Bemiston, Talladega, Alabama.

Q. That is in Talladega County?

[fol. 58] A. Yes.

Q. Are you the clerk of the jury commission?

A. Yes.

Q. What are your duties as clerk of the jury commission, would you explain it to us in detail please?

A. My duties are to compile a roll after the jury commission has presented the names for the jury roll and to prepare cards, all of the same size and texture, putting on each card the name, occupation, the address, and have the roll all prepared and the cards all prepared for the jury commission on their authorization.

Q. Do you list the beats in which each person lies?

A. Yes, each beat. The roll is prepared according to beats.

Q. How many beats do you have?

A. Eighteen.

Q. Do you have any beats which are predominantly considered negro?

A. Well, the larger beats naturally have more negroes than the smaller ones.

Q. Are you acquainted with beat Five?

A. Yes.

Q. Do you know whether or not there are many white persons in beat five?

A. Yes.

Q. There are many?

A. Yes.

Q. Numerous?

A. Well, Talladega has the largest population. That is Beat Five.

Q. All of Talladega is Beat Five?

A. All of Talladega is Beat Five.

Q. Is the beats broken down into precincts?

A. No, just according to beats. We don't have precincts in this county.

Q. Your beats are not divided up, are they? Are you beats divided up into any districts or anything?

A. No.

Q. Do you go out and gather names for the jury roll yourself?

A. No, I do not go into the various beats. I have contacted reputable people in various beats and asked them to send in lists of names that they would consider qualified jurors to be presented to the commission and to see if they would accept them, but as far as actually going and making a trip into the beats, I never have done that.

[fol. 59] Q. What method do you use to get the names on the jury roll other than receive names from the jury commission? All the names which are on the jury roll came from the jury commission?

A. I have helped the jury commission in securing names for the jury roll by just merely as a help to them. I have contacted all the managers, office managers of the various plants and had them send in a list of names that they would consider qualified jurors working at their plants. I have requested names from various colored people for a list of the names that they would consider qualified, that would make qualified jurors.

Q. Other than there is no other system used?

A. Oh, yes. We have city directories, we have telephone books, we have church rolls, we have club rolls that we secure names from. Of course the voting list.

Q. You do use the voting list?

A. Yes, if we use the voting list then we have to check with some person of the beat that we use that voting list, with, to verify the names that we take from the voting list. We can't take just any names from the voting list, unless we have them verified.

Q. What do you mean by verified?

A. I mean whether they would be reputable people or not, qualified people to serve on a jury. We couldn't just go to a polling list and pick out a name and put it on the jury roll unless we knew whether that person was qualified or not.

Q. Isn't it a matter of fact that it takes more qualification to be a voter than it does to be a juror?

Mr. Hollingsworth: We object to that, that calls for a comparison.

The Court: I'll sustain the objection.

Q. We take exceptions to that.

You said you use the registration list and you check the list is that right?

A. We use it some. We don't use it predominantly.

Q. Do you order the registration list from the Board of Registrars or do you go to the office of the Board of Registrars for a copy and copy the names off the registration list?

A. No.

Q. How do you get the registration list?

A. Only from the poll list in the Probate Office. The one that is advertised.

Q. You take it out of the paper?

A. Yes, but now I want you to understand that we do that very little, from the polling list. Most of our names are secured otherwise.

[fol. 60] Q. But isn't it a fact that you take those names from the registration list; if you take those names from the registration list, it shows thereon whether those per-

sons are colored or negro, doesn't the registration list show that?

A. No, I don't think so.

Q. Don't you have "c" behind it in the paper?

A. Not that I know of.

Q. Is there any other method that you use to compile the list?

A. Well, no, only from club lists, from church rolls, from —well, I'll tell you one of the best ways is through the plants.

Q. Has the board or have you ever surveyed the communities in this county for the purpose of compiling the jury roll?

A. I said I do not visit the beats.

Q. The only way you get them is from the plants, church records—now do you have any negro church records?

A. No.

Q. Do you know any negroes who own any plants?

A. No, but there are —

Q. Do you —

Mr. Hollingsworth: She didn't finish her answer.

A. —We don't know any negroes who are managers of any plants here, at least I don't, but negroes certainly are employed in most all the plants here.

Q. Have you—do you have any of those lists in your office at this time that you receive from the plants?

A. Yes.

Q. Do you have any lists that you receive from the churches?

A. No, on the church rolls, I borrow and I return them to the secretary of the church.

Q. But you do have the lists you receive from the plants?

A. Yes, so far as I know I still have a good many club lists, like civic clubs.

Q. You do have club lists?

A. Yes.

Q. Do you have any club lists for negroes?

A. No, as far as I know.

Q. What other lists do you have?

A. Well, I have plant lists and I have club lists and I

[fol. 61] have the telephone directory and I have the city directory.

Q. Do you check the tax assessor's office?

A. No.

Q. Did you bring the jury roll with you?

A. No, I did not.

Q. Could we see the jury roll?

A. As far as I am concerned, you can see it.

Q. Your Honor, at this time we would like to get a chance to inspect the jury roll?

Mr. Hollingsworth: We don't particularly have any objections, your Honor. As a matter of law, at this time, he wouldn't have a right to see it. We have nothing to hide. If your Honor wants to grant his request, we won't interpose any objections.

The Court: All right.

Q. And I would like to see the lists from the plants and any other lists that you have.

Mr. Hollingsworth: We are going to object to going into anything else.

Mr. Billingsley: My subpoena included all the records.

A. I would be happy to bring all those lists I have from the plants, if I have them here. I may not have them here. I may have them at my home. If I do, I will be glad to bring any of those lists that I have from those plants in and let you see them.

Q. Do you have a wide acquaintance among negroes in Beat Five?

A. Not too well. Now of course—not a wide acquaintance I would say.

Q. Do you have a wide acquaintance among the whites?

A. Well, to a certain extent.

Q. Could you observe this jury roll (indicating) and observe the names of each juror listed thereon and tell whether or not the person is a white person or a negro according to the address?

A. According to the street, not always, because some street you know, there are white people on the street as well as negroes, but in a case like Pullum Street or Cruik-

shank or Knox Street or Avenue H, I know that is strictly a colored section. I would know that would be a colored person.

Q. You could check in here and easily determine that, could you not?

A. No. Because there are so many that we have that would not—

Q. (interrupting) Many times you could, couldn't you?

A. Well, if it is an address like that now I would know. But the thing is, I don't know whether there are any white persons on those streets or not, but I might just take it for granted that that is a negro.

[fol. 62] Q. Now, when these lists come in to you you know in most instances that this list consists of whites or negroes?

A. Sure, one or the other.

Q. Then when you place these names on the jury roll you know that they are negroes or whites?

A. Right.

Q. Well—

A. When I am copying that roll, really, I do not pay any attention to it because it is routine. I just type it straight down.

Q. Do you know how many names are on this jury roll?

A. I can't tell you definitely how many but I could just give you an estimate of what I might consider is on it. I will say around 2500 names. I don't know whether that will be more or less, but let's say in my best judgment.

Q. You don't make a notation in here as to the number of names you have on the jury roll?

A. No.

Q. Do you keep any record in your office?

A. No.

Q. You don't know how many names you have in a particular beat?

A. No.

Q. Is this jury roll one you compiled in—last year?

A. The roll you are looking at right there, that you have your hand on?

Q. Yes, maam?

A. That is actually the cards that are in the box right now, that was put in the box last. You see, we have to

separate our cards. Do you understand? We have to separate our cards and hold them out two years, unless they are excused. If they are excused they go back in.

Q. Now this second layer is your reserve?

A. That is the ones that were drawn the past two years that we are holding out that we can't put back in until this box is exhausted.

Q. In other words, the names on this box is reserved regardless of whether or not they were called for jury duty or not, is that right?

A. No, if they were not called for jury duty we return them to the box. You are supposed only to withhold the ones that have been called in the last two years, unless they are excused. If they were excused for any reason they go back in the box.

[fol. 63] Q. How far back does this go? Does it go back to '53?

A. I don't know. Look on there and see.

Q. I believe this last page here shows it goes back to about '53 is that right?

A. If that's right, that is what it is.

Q. How often does the jury commission meet? With you?

A. About twice a year.

Q. Are you also serving as Assistant Circuit Clerk too?

A. Deputy Circuit Clerk.

Q. Are your full duties devoted to the jury commission or what?

A. No. My full duties are devoted to the circuit clerk's office.

Q. Are you familiar with the fact that you are supposed to, as far as practically, place all the names on the jury roll?

A. All the qualified names. Yes.

Q. What efforts have been made to place all the qualified names on the jury roll, of whites and negroes? What efforts have been made? I want to know that because you have stated that you only went by church lists and plant lists.

A. Now the jury commission works on that. You will have to ask them that. I can just answer what have I done.

Q. Then the law does not prescribe that you are supposed to place names on the jury roll and get them, is that right?

A. No.

Q. That is your understanding?

A. That's my understanding of it.

Q. Do you know whether or not the jury commission made a survey of the community for the purpose of obtaining names?

A. I assume they do because they turned in a good list of names to me to compile, as you can see on that roll.

Q. When was the last time they turned in names to you?

A. They turned them in last—well, you say the last time?

Q. Yes, maam?

A. Well, I had to have that roll prepared and all the cards typed by the first of October, so I would say the last time they turned in names to me was around September, last September.

Q. You have those names too, don't you?

A. Yes, I think so. I don't know whether I destroyed the names or not after I typed the roll but I kinda think I have, a good many of them.

[fol. 64] Q. Do you have any judgment as to the number of names that were turned in to you the last time by the members of the jury board?

A. No. But that doesn't mean that they turned all the names in in September. They turn them in all along, because it takes quite a while to type up a roll like that.

Q. Do you mean they start—

A. They start working on the roll—well, they work on the roll all the time so far as that goes, securing names.

Q. Are you acquainted with the population of negroes and whites in this county over the age of 21?

A. I am acquainted with the population of Talladega County.

Q. Are you acquainted with the fact that the Bureau of Census statistics show that there are 12,125 male citizens over the age of 21 in this county?

Mr. Hollingsworth: We are going to object to that. The census would be the best record, if he will bring it up here, we would have no objection.

Q. Your Honor, I would like to put that in evidence at this time.

A. (interrupting) All I am acquainted with is the general population.

Mr. Billingsley: I would like to put that in evidence. I think the Court can take judicial knowledge of this census. The United States census for 1960 shows Alabama's general population characteristics, the United States Department of Commerce, Bureau of Census, shows that your male citizens over the age of, rather your white male citizens over the age of 21, 21 and over, is 3133. And your non-white is 1,179. That is city. Let me get Talladega County. Your white male population over the age of 21 is 12,125 and your non-male, I mean your non-white population is 4,281. The total is 6,406 negro and male—

Mr. Hollingsworth: The total for the county is 34,968—

The Court: Do you want me to state it for the record.

Mr. Billingsley: Yes, sir.

The Court: The white population in Talladega County is 44,525, the colored population in Talladega County is 20,970, according to the last Federal census of 1960. The total population is 65,495.

Q. Are you acquainted with the fact that the clerk of the jury commission in most counties in the State of Alabama is under the direction of the jury commission and as such, under such direction of the jury commission, that the clerk is supposed to obtain the names of every male citizen over the age of 21?

A. Yes, I know that.

[fol. 65] Q. And under 65 years of age?

A. Yes.

Q. You said the only method was merely letting people send in names?

A. I stated that the only methods I used was, the church rolls, civil club rolls, through the poll lists, through the city directory, through the telephone directory and by requesting lists from various ones. Now, I have requested lists from several colored people here, two of whom are R. D. Savage, Jr. and Mabry over at the West End School, have sent in lists at various times to the commission, not to this commission but to the commissions previous to this.

Q. I see.

A. I requested a list from Robert Strickland and he promised me he would send me the list, but I never received one from him. Then there was another colored

man that was up here, he was on the jury. Right off-hand I can't think of his name.

Q. He was on a grand jury?

A. I don't recall whether it was a grand jury or not, but anyway he was on the venire. I don't know whether he sat on the jury or not, but he was here and I requested a list from him.

Q. You requested a list from about ten negroes, is that right?

A. I said I requested from R. D. Savage, Jr. He sent a list. I requested from Strickland and I never did get a list from him. In fact, I called him twice and I saw him up here in the office and talked to him. I requested—not on this present commission but on the commission just before this one, Maybry, principal from over at West Side School and he was very kind in sending in a list every now and then. This other colored man whose name I can't recall just now, I requested a list from.

Q. Are you acquainted with the fact that the jury commission is supposed to require the clerk to scan the registration list, a list returned to the tax assessor, any city directory, telephone directory and any and other source of information from which he or she may obtain information and to visit every precinct and in your case a beat, at least once a year to enable the jury to properly perform the duties required of it by law?

A. I have read that statute.

Q. But you have never visited?

A. I have never visited in a beat.

Q. Nor has any other jury commissioner visited all the beats within the county?

A. Yes, I think the jury commission has, but I can't [fol. 66] answer for them, but I have not myself. I said I had never been in the beats. They have never requested me to do it, and I have never done it.

Q. But your acquaintance is far wider among whites than it is among negroes in this country; is that right?

A. I would more or less confine my acquaintance to the whites of Talladega.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. Mrs. Young, whenever—

First, I would like for the record to show that the names of both white and colored, when you type the list, are they treated the same?

A. Absolutely.

Q. Are they listed alphabetically?

A. Alphabetically.

Q. I would like for this book to be described for the record. It is the jury roll book of Talladega County, being bound and upon opening the book it reveals beginning April 1961, the Minutes of the Jury Commission, October, 1961 and on the 22nd day of November, 1961, April, 1960, October, 1960, October, 1959, November, 1959. And further there is an order stating: "State of Alabama, Talladega County, In the Circuit Court. The Jury Commission of Talladega County in accordance with authority vested in me by Act 475, approved September 8, 1955, entitled an act to further regulate the preparation of the jury roll in filling and re-filling the box for Talladega County, you are hereby ordered to meet at the county courthouse in Talladega, on September 30, 1959 to prepare a jury roll, refill the jury box in the county, as provided in said act. This the 15th day of September, 1959. signed, William C. Sullivan, Circuit Judge of the 29th Judicial Circuit of Alabama. The order follows on October 7, 1959.

Then we would like the record to further show that this book begins in Beat One which is Lincoln, Alabama and the names are on this list in alphabetical order. Let the record show that they are listed, first is the name, the last name first and the Christian name, how have you got it listed, Mrs. Young?

A. I have got the last name first.

Q. And next is the occupation or residence address the business address and then there is a place for date em-paneled. They run One through Eighteen beats.

What type cards do you use for the jury box, Mrs. Young?

A. Plain white cards.

[fol. 67] Q. Are they the same size and texture and quality?

A. They are all the same size, texture and quality.

Q. What information is put on these white cards when they are placed in the jury box?

A. The name, occupation, the street address and the residence, where they are from.

Q. The same color cards are used for both races, are they not?

A. All the cards are exactly alike, white.

Q. Is there any color, or any identification or description placed on the colored's card?

A. None whatever.

Q. These cards are prepared by you, are they not?

A. Yes.

Q. You say you are Chief Deputy Clerk in the Circuit Clerk's office?

A. Yes.

Q. As Chief Deputy Clerk in the Circuit Clerk's office, I'll ask you have you seen this book before?

A. Yes.

Q. Let the record show that it is State Minute Book 4, Talladega County, Circuit Clerk's office.

Who is the Circuit Clerk at this time?

A. Arthur K. Wood.

Q. How long has Mr. Wood been Circuit Clerk?

A. Going on sixteen years.

Q. How long have you been employed in his office as a clerk, Mrs. Young?

A. About eight years.

Q. Is this minute book—I would like to get this page numbered 601 and 602 marked State's Exhibit No. 1.

Is this record kept pursuant to law?

A. Yes.

Mr. Billingsley: I am going to object to that it calls for a conclusion and ask that it be stricken as to whether or not it is kept pursuant to law.

The Court: I'll sustain and exclude it.

Q. Where is this record kept?

A. It is kept in the office of the Circuit Clerk.

[fol. 68] Q. How long have you all been keeping the re-

ports of the Grand Juries in that office to your knowledge?

A. To my knowledge, ever since about 1941 to my knowledge.

Q. Was this Grand jury report accurately transposed and placed in this minute book?

A. Yes.

Q. Was it done by you or someone under your immediate supervision?

A. I won't say that it was done by me. It could possibly have been done by me. I don't remember, but some clerk in the office that was employed in the circuit clerk's office at that time did it.

Q. In 1953 how many clerks were there employed in the circuit clerk's office?

A. Two.

Q. Mr. Wood, the Circuit Clerk, he did no typing did he, that is transposing of records?

A. Yes.

Q. He did, in the Minute Book?

A. Oh, no, he never typed anything like that but he as far as knowing typing he did know it.

Q. Do you have the original in your office?

A. Yes.

Q. Did you have an occasion to check your original with this this morning?

A. Yes.

Q. Do you know of your own personal knowledge whether or not this is a true and correct report of the Grand Jury for the February term, 1953?

A. It is.

Q. Is it now in the same or substantially the same condition as it was at the time it was recorded?

A. Yes.

Q. At this time, may it please the Court, we offer—I withdraw that. We will not offer it at this time.

That is all at this time.

Redirect examination.**Mr. Billingsley:**

Q. You are Chief Deputy Circuit Clerk?

A. Yes.

Q. How long have you been Chief Deputy Circuit Clerk?

A. Almost eight years, in September.

[fol. 69] Q. Were you working in the Circuit Clerk's office prior to the time you became Chief Deputy Circuit Clerk?

A. No, I have been Chief Deputy ever since I went to work in that office.

Q. Since you have been employed as Chief Deputy Circuit Clerk you have been present at most times in the courtroom during the time jury cases were being tried?

A. Sometimes, not every time. The Circuit Clerk is in here most of the time.

Q. You have been present on numerous occasions when jury cases were being tried in which there were twelve men sitting in the box over there, or wherever the box was, have you not?

A. Yes.

Q. You have observed both criminal and civil cases, have you not?

A. Yes.

Q. Have you ever seen a negro serve on a petit jury in this county since you have been Chief Deputy Circuit Clerk?

A. No.

Q. Will you be able to get those lists that you were referring to which you received from various persons as well as plants, for us to observe?

A. Yes, I will be glad to if I have it.

Q. You don't have to get it now. I would just like to get them if possible.

A. All right.

Q. That is all.

(Witness excused.)

WILLIAM TAYLOR: Called as a witness, having been duly sworn, testified as follows:

Direct examination.

Mr. Billingsley:

Q. State your name to the Court?

A. William Taylor.

Q. Where do you live?

A. 203 Jackson Street.

Q. Is that in Talladega County, Alabama?

A. Yes, it is, in the city limits of Talladega.

Q. How long have you lived in Talladega County, Alabama?

A. Well, about 47 years.

Q. How old are you?

A. 57.

[fol. 70] Q. You are a member of the negro race, are you not?

A. I am.

Q. During the 47 years that you've lived in Talladega County, have you ever been summoned for jury duty?

A. I've been summoned.

Q. Where were you summoned?

A. I don't know. '58 or '59, one, somewhere along in there.

Q. Were you summoned—did you serve on the jury?

A. None. I have never served.

Q. But you were called?

A. I was called.

Q. To serve?

A. To serve.

Q. Have you ever been present when jury cases were being tried in this court?

A. I have.

Q. Have you ever observed a negro serving on a jury, petit jury, of twelve men, since you came to court?

A. No, I have never seen a negro sit on any jury.

Q. Do you have a wide acquaintance among—incidentally, what beat do you live in within Talladega County?

A. Beat Five.

Q. Is that beat predominantly negro or white?

A. Negro.

Q. Do you know what the borders of that beat consist of?

A. From the A.C.L. Railroad back to Battle Street and extending back to the city limits.

Q. Are you acquainted with the extent of the beat actually?

A. Yes.

Q. I beg your pardon.

A. From the A.C.L. Railroad tracks, extended back to Battle Street and I think about four or five of the whites votes in the box seventeen.

Q. Have you ever seen a map which sets out beats in this county, have you ever observed a map?

A. I saw a city map here not long ago.

Q. Are you a registered voter?

[fol. 71] A. Yes, I am.

Q. Do you have a wide acquaintance among negroes in this county?

A. Yes, I worked at the Isbell Bank over there as a porter for six years and I practically know, at that time, about everybody in Talladega.

Q. Do you have a wide acquaintance among negroes in Beat Five?

A. Yes, I do.

Q. Do you have a wide acquaintance among whites in Beat Five?

A. Well, just about, there ain't over five in that beat, in Box 17.

Mr. Hollingsworth: We are going to object to him talking about Voting Box 17. He doesn't know where Beat Five is.

A. All of Talladega is beat Five.

Q. Do you have a voting box 17?

A. Yes.

Q. What area does that comprise?

A. Oh, that.

Mr. Hollingsworth: We are going to object to this voting box 17. That has nothing to do with this at all.

Mr. Billingsley: I don't know, your Honor, I have been trying to find out all morning how it is divided up. I didn't

want to have to summons the Board of Registrars or anything in to determine that. But it was my understanding that the county was divided into beats and I was trying to ascertain whether or not the beats were divided into anything. But there are voting boxes in certain areas. The Board of Registrars evidently have a certain area that put a box for a group of people to vote in in a certain area also. What I was trying to find out—

Q. —Do you know what that is called?

A. Well, I said Beat while ago but the box area consists of the A.C.L. Railroad tracks back to Battle Street, extended back out to the city limits. That is Box 17.

Q. Box 17?

A. That's right. That's the one I vote in.

Q. Do you know how many boxes you have in Beat Five?

A. No, I don't.

Q. Do you have a wide acquaintance—you said this Box 17 constitutes an area where there is nothing but negroes practically, is that right?

A. That's right, about five white folks, not over five.

Q. But you do have a wide acquaintance among negroes in Beat Five. Now do you have a wide acquaintance among [fol. 72] white folks in Beat Five?

A. In Beat Five or Box Five?

Q. Beat?

A. The whole Talladega counts as Beat Five.

Q. I see. Do you have a wide acquaintance among negroes in Beat Five?

A. Yes.

Q. Do you have a wide acquaintance among whites in Beat Five?

A. Yes.

Q. I am going to show you this jury roll and if your Honor permits—what I want him to do is to go through Beat Five and let him observe this jury roll—and in the meantime we could use another witness in order to save time, and then recall him.

Mr. Hollingsworth: We are going to object to him going down the jury roll, because the jury roll speaks for itself.

Mr. Billingsley: It doesn't speak for itself if we don't know what is in it.

Q. Are you sure it was '58 or '59 that you served?

A. It was somewhere in '58 or '59 because I had stopped work at that time. I think I had retired from the job and so I think it was in '59.

Q. Where were you working at that time?

A. Fort McClellan, Alabama.

Q. What were you doing there?

A. Boiler-fireman.

Q. Was there another negro when you were summoned at that time with you?

A. Solomon Pettis.

Q. Sullivan what?

A. Pettis.

Q. When did he serve?

A. Same as I.

Q. Did he serve at that time?

A. He was summoned.

Q. Do you think you could take this jury roll here and examine it and determine by such examination whether the names thereon would be names of negroes or white persons?

Mr. Love: We object to that.

A. According to location I could, if they had the address.

Q. You would know some names immediately would you not?

A. That's right.

[fol. 73] Q. I would like for you to take this jury roll for Talladega County which was compiled in October, 1961, the area known as Beat Five and examine it and see how many names you can find thereon which are names for negroes, which are negroes?

Mr. Hollingsworth: We are going to object to this. He is going on a fishing expedition. He has subpoenaed the jury commission and he has the other two members here. This man—what he knows or who he doesn't know in a beat this size would be immaterial. We would like to ask him a few questions on the voir dire.

The Court: All right.

Voir dire examination.

By Mr. Hollingsworth:

Q. Did I understand you to say that Beat Five consisted of Coosa Street, what did you say Beat Five consisted of?

A. I told you Beat Five was the whole city, but Box 17, I told you.

Q. Tell me the lines for Beat Five?

A. I told you that Beat Five was the whole city but Box 17—I made the distinction there, from the A.C.L. Railroad track back to Battle Street.

Q. That is where you vote. Where did you see a map of that?

A. Map of what?

Q. What Beat Five, Box 17 consists of?

A. I saw it when the box was first set up there.

Q. Where was the map?

A. The map was up there in the city hall.

Q. How far did it go over College Hill if you know?

A. It goes about the city limits I think.

Q. It goes all the way to the city limits?

A. I think it does. I think the colored people vote to the back back there.

Q. How many white people do you know in Talladega?

A. I don't know how many I know in Talladega.

Q. How many can you name that live in Dellwood Estates?

A. In Dellwood Estates?

Q. That's right.

A. Where is Dellwood Estate at?

Q. How many do you know that lives on Glenwood Road?

A. Where is Glenwood Road.

Q. It is in the Pines, that is a community here in Talladega, you are acquainted with it. How many do you know that live on Glenwood Road?

[fol. 74] A. Well, in the Pines. Mr. Hammett lives over there and Mrs. Lillie Rickwood lives over there, my wife works for, and Mr. Langley lives over there.

Q. Mr. Hammett lives on Spring Street!

A. Yeah, I know. They calls that all Pines over there. That is what we calls it when we work over there.

Q. How many folks do you know lives on Glenwood Road?

A. I don't know the streets. I don't know but just a few streets, but you tell me where it is and I can tell you all about who lives over there.

Q. How many do you know out on White Road?

A. White Road. What, white people or colored people?

Q. On White Road?

A. I know Spencer.

Q. What is his full name?

A. I can't tell you what his full name is. I know Morris out there.

Q. Morris who?

A. We call him "Frog" Morris, a great big fellow.

Q. Frog Morris don't live on White Road. He lives over there back of S. & R. Lumber Company, back around J. B. White's property?

A. We call all that White Road back over theré. I do.

Q. Are you crippled?

A. Yes, I got arthritis.

Q. How long have you been on the sick list?

A. On the sick list?

Q. That's right, been down with arthritis?

A. Well, about seventeen years, just as soon as I come out of service.

Q. Did you retire at Fort McClellan or did you quit?

A. No. They retired me. On disability.

Q. Apparently your name is not in the jury box now, I guess, as a matter of record. Do you know whether or not the jury commission took you out because of disability?

A. I didn't know they put me in.

Q. Didn't you testify that you were here as a juror in 1959?

A. I was here. I didn't go—I couldn't swear my name was in there then.

Q. You got the subpoena?

A. I got the subpoena. I got one now. I was in Birmingham Monday.

Q. You got a subpoena to come up as a juror?

[fol. 75] A. No, not as a juror, to appear in court.

Q. How many subpoenas did you get to come up for a juror?

A. Two I think.

Q. Did you come each time?

A. Sho did.

Q. Did you ask the judge to excuse you because of your health?

A.. No.

Q. You were here to serve?

A. I was a boiler fireman.

Q. What?

A. I was a boiler-fireman one time. I got excused because—

Q. The first time you asked for an excuse to go and fire the boiler?

A. Well, because we didn't have enough men up there. That's right.

Q. What happened the second time?

A. I stayed up here three days. When I come back the fourth day they told me they didn't need me.

Q. Had they already struck the jury?

A. The clerk of the court was the one told me they didn't need me. So he paid me off.

Q. That is all.

Mr. Billingsley: I would like to renew my request to have him observe this book. I suggest that he take it over there and—

Mr. Hollingsworth: We are going to renew our objection. What he knows—we could bring people in here and put them up there and let them testify to who they know and who they don't know. It has little, if any, probative value.

The Court: I'll sustain the objection.

Mr. Billingsley: We take exceptions.

The Court: All right.

Redirect examination.

Mr. Billingsley:

Q. Are you familiar with the area called Lincoln?

A. Yes, I used to live up there in '23 and '24. I peddled up through there about the last two or three years.

Q. Do you have very many negroes living in that area or do you know?

A. I know quite a few up there.

Q. Do you have a great deal of white people living in that area?

A. Yes, a good deal of white people live up there.

[fol. 76] Q. This is a small list here and I would like to ask if it is permissible for him to look at this briefly, to ascertain whether or not he sees the names of any negroes on Beat One, there are just two pages of it.

Mr. Hollingsworth: We are going to object to that, unless he is familiar with it—it is not even shown that he knows what all Beat One consists of. May it please the court. It consists of more than the community of Lincoln.

The Court: I'll sustain.

Q. We take exceptions.

Are you familiar with the area of Beat Six, known as Alpine?

A. I haven't been around Alpine too much.

Q. Are you familiar with the Silverrun beat?

A. Well, I peddle up through there. I know quite a bit of people. I don't know them exactly by name. I got a lots of cousins up there too.

Q. Are there any white people living in that particular beat?

A. Silverrun?

Q. Yes.

A. Well, there are a few living up above what they call Silverrun, but not right in Silverrun so much.

Q. Does it consist predominantly of negroes?

A. Well, right there in Silverrun it is.

Q. Right in Silverrun?

A. Yes, but right off of Silverrun there is a whole lots of colored people between there and what you call—between there and Turner Dairies, see?

Q. I see. Do you have a wide acquaintance among negroes in that area?

A. Yeah, right around Silverrun I do.

Q. Your Honor, I am going to ask—this will be probably the last time, I'll ask you to observe this page right here. Beat Three, Silverrun, October, 1961, compiled by the Jury Commission of Jefferson County, do you see those names?

Mr. Hollingsworth: We are going to object to him showing him the jury list because it hasn't been shown that he knows what the beat in Silverrun consists of, and other than maybe one little community that he knows about and his testimony would have no probative value.

Q. You know the area called Silverrun?

A. Yes.

Q. Do you see the names of any negroes listed on this page?

[fol. 77] Mr. Hollingsworth: We object to that. The names appearing on there, unless he know what person it is, the name of the person there might very well be a negro or a white man.

The Court: I'll sustain.

Q. Would you be able to tell by the address or anything?

A. I would be able to tell by some of the box numbers up there.

Q. If you saw two names, or one name, would you be able to tell, if you saw the name of a negro named John Doe, would you be able to determine in that beat whether or not there was also a white man named John Doe, in many cases?

A. Well, not right in a certain beat. If you said a beat where I lived or where I peddle I would know whether there was a white man living in that vicinity or not. Of course over further I wouldn't know whether it was a white man.

Q. (interrupting) But you would know in Beat Five would you not?

A. In—

Q. In Beat Five the area where you live, in Box 17?

A. I would know in Box 17. I wouldn't know in Beat Five. I would know in the box, which I vote in.

Q. Do you know of any white persons who live in that area with names similar to that of negroes?

A. What area?

Q. In Beat Five, Box 17?

A. We have one white man that votes up there, Dr. Gross up there, I don't know of any other Gross up there but him.

Q. Do you know of any negro with a similar name?

A. I don't know a negro Bross.

Q. That is all.

Recross-examination.

Mr. Hollingsworth:

Q. How old are you?

A. I will be 57.

Q. How long have you been walking with a stick?

A. I walk with this stick sometimes and sometimes I lay it down, according to how I feel.

Q. How long have you been using it this last time?

A. I have been using it about two years, off and on.

Q. You said something about the population of Talladega, do you know what percentage of Talladega is white [fol. 78] and what percentage is negro?

A. I know what they said while ago.

Q. I am talking about do you know?

A. Naw, I never taken no census. I couldn't tell you.

Q. Do you know how many people live in Beat Five?

A. No, I don't.

Q. That is all.

(Witness excused.)

JOHN ELLIS: Having been duly sworn, testified as follows:

Direct examination:

Mr. Hall:

Q. State your name and address, please sir? And occupation.

A. J. R. Ellis, Lincoln, Alabama, Route One, farmer.

Q. Are you a member of the jury commission or board here in this county?

A. I am.

Q. How long have you been such commissioner?

A. Since '59.

Q. And since you have been on the board, has that board compiled or refilled the jury box in this county?

A. On two occasions.

Q. When was the last occasion?

A. Last October.

Q. On that occasion, what did you and your commission do?

A. You mean that particular date.

Q. In going about filling the jury box?

A. Well, the preliminary work had been done quite some time prior to that so that the clerk could type the names, but these names were prepared and on cards, and we filled the jury box at that time, the three members were present.

Q. If I understand you, you had secured the names prior to this last October?

A. That's right.

Q. On that date the clerk had put them on the cards?

A. We had secured the names prior to that day and she had typed them on cards and we filled the box from that.

Q. How did you go about securing these names, Mr. Ellis?

A. Well, different ways, of course we had some that we had to clarify, I mean to rework from the prior roll: Then [fol. 79] we went through different ways, clubs, different people in the community, we got lists that they recommended.

Q. Clubs and people?

A. That's right, and different communities, and then we brought them into the commission and they acted as a commission.

Q. What other method did you use in securing these names?

A. How do you mean what other method?

Q. Did you use any other method, except going to the clubs and the people in the community?

A. Well, in the City of Talladega the City Directory was used.

Q. And any other method?

A. Well, offhand I don't know, it was a pretty hard job to get several thousand names to fill the box.

Q. Did you and the other members of this board ascertain these names as a board or did you do this as individuals?

A. We worked as individuals, but what we did, we did

as a board. We worked as individuals to help get the names in the different communities and then what we did was as a board.

Q. Each of you did whatever you did as individuals and then you would come together later on?

A. That's right.

Q. Now, when you would have your board meetings and function as a board, did you keep minutes?

A. Yes, sir, the secretary kept the minutes.

Q. You kept minutes of all your actions, or your official actions?

A. That's right.

Q. And your board does have a full time clerk?

A. Yes, sir.

Q. What does this clerk do going about filling the jury box?

A. She does all the stenographic work.

Q. This is a lady?

A. That's right, Mrs. Asa Young.

Q. What else does she do?

A. That is about it.

Q. She doesn't go out into the county?

[fol. 80] A. No.

Q. She doesn't go out into the county once a year and canvass the people in each beat?

A. No.

Q. She has never done that?

A. Not to my knowledge.

Q. Does she do anything at all to help fill the jury list—all she does is just stenographic work?

A. Yes, and she helps compile these names for us.

Q. After the board members bring them in?

A. She probably helps get some in. I know for a fact that she tried to get some from some people here in Talladega.

Q. How long has she been clerk of the jury board?

A. I couldn't answer that. You would have to ask her that.

Q. Do you have any other administrative help on this board?

A. No.

Q. Your clerk serves as stenographer and clerk and everything?

A. That's right.

Q. And the only other members are your jury commission itself?

A. That's right.

Q. Who evolves the policy of this board?

A. The jury commission, according to law. According to the statute.

Q. Now in filling the jury box and subsequently making the jury roll, do you place in this box the names of all the citizens of this county?

A. No. We put the ones that are qualified.

Q. What formula do you use to ascertain who is qualified?

A. That is a matter of opinion there, because what I might call qualified somebody else would know something that I would not know, so I think that is a matter of opinion.

Q. Has the board ever met on this matter of qualifications?

A. We have discussed it, yes.

Q. Did you come to a conclusion?

A. From a legal standpoint it is plain, what the law says.

Q. What is it?

A. Well, you have it there before you. But, all male citizens that are held in high esteem in their community and of good report and never been convicted of crime, and so forth, it is quite a good many things.

[fol. 81] Q. Do you place all such persons names on your list?

A. All such what persons?

Q. Such persons as those described by the passage from the Code which you have just recited, all male persons who are esteemed in their community, who possess certain qualifications?

A. No, because that would be almost impossible to get all.

Q. How do you decide who to get and who not to get?

A. We go into the different communities as much as we can and check on it and we have quite a few more names to operate on than what goes in the jury box.

Q. When you say you go to communities as much as you

ean and check on them. Then do you have your regular, routine or regular method, how do you do it?

A. Well, that is what I said, when I said it is a matter of opinion as to who is qualified to serve on a jury.

Q. Whose opinion?

A. It would be a difference in my opinion and in your opinion.

Q. Your individual opinion or would it be a matter for determination by the board, that is what I mean?

A. It is a matter for determination by the board.

Q. Does the board go into the community and determine these qualifications?

A. Not as a group, no. As individuals—; they go as a group too, but as individuals and then they come back and pass on it.

Q. When you go as a group what do you do?

A. Wait a minute. When we go as what?

Q. When you go as a group, you say you go into these communities as a group?

A. You misunderstood me there because we do not go as a group. We go as individuals and then we come together in the board meeting.

Q. I see. Now when you go as individuals then, Mr. Ellis, what do you do? Do you call on people in their homes or do you meet them some place?

A. It could be in their homes and it could be in their business and in lots of cases we have personal knowledge of ones that are qualified.

Q. Is it possible that there are persons who are qualified who are not on your list?

A. Yes, it is possible.

Q. How is that possible?

A. That they are not on our list?

Q. Yes, in view of the statute requirements that you should have every such person on the list.

[fol. 82] Mr. Hollingsworth: We object to that, he is arguing with the witness.

Q. Your Honor, please. I am not arguing with the witness. I was explaining my question. My question was—the witness has testified, or rather he has quoted the statute, saying that they place the names as the statute set out—

and he has also testified that he doesn't have every such person on the list. I want to know why.

The Court: Tell him why.

A. Well, because frankly we have, I imagine 2500 or 3000 names in the jury box and that is every other year, and that, if you have two lists that should be from five to six thousand people, and why we don't put them all on there is just a matter that we might overlook some of them because we are not taking census when we go out there.

Q. Aren't you aware of the fact that the statute requires that the clerk is to go out and visit the precincts?

A. No, I am not aware of the statutes, now. I am not a lawyer.

Q. You did mention the statute?

A. I have read it.

Q. Do you know how many male persons there are in this county over the age of 21?

A. No.

Q. How many did you say there were on this list?

A. Frankly, I don't know, but I would somewhere from four to six thousand, I couldn't tell you. On the two lists now, not this list. Approximately two thousand, twenty-five hundred last October and the same thing two years ago.

Q. Two thousand and twenty-five hundred?

A. Approximately, yes.

Q. In your best judgment it wouldn't be less than two thousand?

A. I wouldn't think so.

Q. And in your best judgment it wouldn't be over 2500?

A. Yes.

Q. You use only one list at a time, are you?

A. That's right.

Q. You change this list every two years? You refill the box every two years?

A. That's right.

Q. Although I believe you did testify that sometimes you re-worked the old list is that right?

A. Well, we have two lists.

[fol. 83] Q. Will you tell me what you mean by two lists?

A. I believe that has been explained here before, but every two years we fill the jury box and the ones that are in that jury box are kept out until we refill it and while we—while that box is being used, we re-work the ones that

are deceased or moved or what-not, and there is a list of prospective jurors being carried forward each time.

Q. Then in your opinion, in effect, you have two lists which are active at one time and you are drawing jurors from two lists at the same time?

A. No.

Q. You are drawing jurors from only one list?

A. One list and we re-work—

Q.—You rework the other list. At the present time the number of jurors available to the courts of this county would not be over 2500 and would not be less than two thousand in your best judgment, that is the last list?

A. That is the last list we filled in October. I believe that is about right, that is to the best of my judgment.

Q. How do you determine, Mr. Ellis, when you have a sufficient number of jurors on your list to satisfy the requirements of the county and of the court and of the statute?

A. Will you repeat the question.

Q. How do you determine when you have enough jurors on your list to satisfy the requirements of your courts and of the statutes?

A. That is a hard question to answer there. We work as hard as we can to get as many as we can because the more we have the better it is, but to do a good job we don't want to put in there that would disable, or what-not.

Q. Well, in your best judgment then you don't have all of the male citizens in the county on your list?

A. I wouldn't think so.

Q. You have no particular method by which you determine when you have had enough on the jury list?

A. No.

Q. Do you use the same method to pick white jurors as colored jurors?

A. The same method. There is no difference.

Q. I believe you testified that you went to the clubs. Do you go to the white clubs. Now what clubs do you usually go to?

A. Did I say clubs?

Q. I understood you to say clubs. I might have been mistaken?

[fol. 84] A. I might have said it. I don't go to any clubs. Let me put it this way. I have a connection with the

Farm Bureau, I have a connection with R. E. A. that I get some names from and I check those in the different communities:

Q. I assume that is a Farmer Co-operative?

A. Yes, sir.

Q. You don't check with any clubs?

A. I go to the individuals in the different communities, in the particular area that I have been working as an individual—of course we work as a whole—but in the particular community, the way I have been working has been purely rural areas.

Q. So there are no clubs out there?

A. No, there are no clubs. That is the reason I asked the question, did I say clubs.

Q. Now, from the Farm Bureau did you get the names of whites and colored?

A. That's right.

Q. From the R. E. A. did you get the names of whites and colored?

A. That's right, no distinction.

Q. What is the R. E. A.?

A. It is an electric cooperative.

Q. Rural?

A. Rural electric cooperative.

Q. Composed of persons who had band together—

A. (interrupting) who use electricity, that's right.

Q. Are there any negro members of this cooperative?

A. Yeah.

Q. Are there any negro officers in that organization?

A. No.

Q. When you check with the R. E. A. do you check with the administrative staff, their office force?

A. How do you mean?

Q. When you go to the R. E. A. for these names?

A. Check with the administrative staff?

Q. Yes. Which portion of the R. E. A.?

A. This is Coosa Valley Electric Co-operative.

Q. But you would get this from the office force, wouldn't you. You go to the office to get these names?

A. To get a list of the customers, yes.

[fol. 85] Q. Of all the customers?

A. Right.

Q. And from that list you select the jurors?

A. That's right. The ones that are in there, yes. But I go into the community where these people live. I don't just let the co-operative say so. I go into the different communities where they live.

Q. Are there a considerable number of negroes who are members of the R.E.A.?

A. Yeah, they take service.

Q. Do you have any judgment as to the approximate number of negroes?

A. No.

Q. How does the Farm Bureau operate, what is that?

A. It is a farmers co-operative. It is mostly an insurance outfit, even though I am a farmer, it is mostly an insurance outfit.

Q. Is it a real organization or just a paper organization?

A. It is.

Q. It is a real organization?

A. It is.

Q. And it has negro members also?

A. It has.

Q. Do you know how many negroes?

A. No.

Q. Would you say there was a considerable number of negroes?

A. I wouldn't have any way of knowing.

Q. But you are a member of that cooperative?

A. Yes.

Q. Have you had any meetings of your group?

A. I am a member simply because I am a farmer and I take insurance from them and I have to pay the dues to take insurance.

Q. I take it, you don't know whether there are any members or not?

A. The Farm Bureau, no, I don't know.

Q. You just don't know?

A. No, if they have insurance they are members.

Q. They would have to be a member in order to have insurance?

A. That's right.

Q. But they may not have insurance, is that true?

[fol. 86] A. They are not a member then, unless they just volunteer and pay their dues.

Q. You go to the Farm Bureau and get names. You may not get any negro names because you don't know whether there are negroes there or not, do you?

A. No, I don't know.

Q. How about the other farmers cooperative, are there other farmer cooperatives?

A. There are quite a few.

Q. Are they all organized for the same purpose or for different purposes?

A. Do you mean the farmers cooperatives?

Q. When farmers—ordinarily in a given community they organize a farmers cooperative for the purpose of marketing goods?

A. There is a farmers cooperative that sells commodities down here, there are quite a few negro customers and members.

Q. Which one is this?

A. This consumer cooperative that sells fertilizer and seeds and so forth, it sells to rural people.

Q. That isn't a farmer's cooperative?

A. Yes, sir, Talladega County Exchange.

Q. There are quite a few negroes in that?

A. That's right.

Q. And you get a list of their members?

A. That's right.

Q. From whom you select your jurors, your members for the jury venire?

A. That's right.

Q. Have you gone to any purely negro organizations for a list of names?

A. No.

Q. Have you ever gone to the local Elks club?

A. No.

Q. Or Masonic group?

A. No.

Q. Any religious organization of negro communities?

A. Well, yes, to some extent.

Q. What do you mean?

A. I have knowledge of some people that belong to the church out there in my community and I go to them.

Q. But you do not go to the church itself?

[fol. 87] A. No.

Q. And ask them to suggest any names?

A. No, I haven't.

Q. In your opinion, Mr. Ellis, how many members of your present jury list are negroes?

A. Percentagewise

Q. Yes. Oh, I would like for you to give me a number?

A. Oh, I couldn't give you any number but I would say approximately in my best judgment there are between ten and fifteen percent, maybe higher, negroes, and that is conservative.

Q. Ten to fifteen percent of your present list are negroes?

A. That's right, it could be more but I would say conservatively, it would be between ten and fifteen percent.

Q. Would you care to say how you would arrive at this figure?

A. I am arriving at that just from in my own community, in my end of the county that I operate in, because I think that the others—now, I don't know what they have done, but from the northern end of the county, I would guess that it is between 10 and 15 percent. It could run higher.

Q. That is in your section of Lincoln and that section?

A. That's right. Not Lincoln alone, now, don't get me wrong. The northern end of the county.

Q. Would you have any actual figures in that end of the county?

A. No, other than just percentagewise.

Q. You say if there are 150 jurors, at least fifteen of them are negroes?

A. Yes, to the best of my judgment.

Q. Do you use any other method except the farmers cooperatives and the one which you mentioned previously and finding the names of white jurors, do you for instance go to the local Kiwanis Club or Lions Club?

A. No, I am not a member and I don't go.

Q. Do you touch any organization in this county for a list of their members other than the ones that you have just mentioned?

A. No.

Q. Do you put the names of those with whom you are acquainted?

A. That's right.

Q. Do you have pretty wide acquaintance in this county?

[fol. 88] A. In the northern end of the county I do.

Q. You are a native to this county?

A. No, I have been here 42 years.

Q. You have lived in that section—

A. 42 years.

Q. You are pretty well acquainted in that section?

A. That's right.

Q. Those persons whom you know, naturally you put on the list?

A. Not always, there are quite a few of them that I know that I don't put on there.

Q. There are quite a few that you know that you do put on there?

A. That's right.

Q. Are you pretty well acquainted with Negroes in that area too?

A. That's right.

Q. How many negroes do you say that you know pretty well?

A. Now, I don't know that. That is an impossible question to answer.

Q. Do you say you know all of them?

A. No.

Q. Half of them?

A. I wouldn't give a figure because I just don't know.

Q. What beat is that you live in?

A. Beat One.

Q. You are very well acquainted with the people in Beat One, are you not?

A. Not since 1945, the population changes about every three years.

Q. But most of the folk in Beat One are persons whom you put on the list are they not?

A. I wouldn't say so, no.

Q. Could you examine this jury list, that section of the list from 1959 for Beat One, and identify the persons thereon as to race from looking at their names?

A. Not all of them, no.

Q. And address?

A. Not all of them.

Q. What percentage do you know?

A. I wouldn't guess because I don't know.

Q. Do you think you would miss it more than ten percent?

A. That I don't know.

Q. So you just wouldn't know from looking at this list [fol. 89] for your beat whether or not such persons were white or not?

A. No, because there is no identification, no way to the list or to the cards to distinguish them in any form.

Q. May I ask you this. Do you know the boundaries of Beat One?

A. Yeah.

Q. Will you tell me what they are?

A. Jackson Trace West, from Choctawhatchee Creek up Jackson Trace to the Calhoun County line West of the Choosa River and bounded by Choctawhatchee Creek on the South.

Q. Do you have any judgment as to approximately the measurements of that area?

A. I do not.

Q. Do you have any judgment as to the approximately number of people who live in that area?

A. I do not.

Q. You have absolutely no judgment as to how many people live there?

A. I can tell you how many voters, approximately, are on roll, but now who lives there I don't know. They voted a little less than six hundred people in the last election.

Q. That wouldn't be any indication of the total population?

A. No.

Q. You have no judgment as to the percentage of the total population which might be colored?

A. No. I'll answer it no, because I have not had any occasion to figure it on a percentage basis.

Q. Could you examine this voters list—has this been marked for identification.

Mr. Billingsley: No, it hasn't.

Q. We are not offering it but we keep referring to it.

The Court: You can stipulate that is the only voter's list, I mean jury list, here.

Q. That is all right, whatever your Honor suggests.

Mr. Hollingsworth: It has been described for the record.

Q. Could you examine any part of this jury list and identify any name in there as being colored?

A. I probably could identify a few.

Q. Do you think you might be able to identify as many as twenty?

A. I wouldn't put any figure on it because I couldn't tell you.

Q. You know 20 colored people in your county, don't you?

A. I think so.

[fol. 90] Q. Do you know 20 whose qualifications are sufficient to be jurors?

A. I do.

Q. There are not 20 on this list are there?

A. No, I am not going to put a figure on it because I don't know.

Q. You are not sure that you could identify the names of 20 negroes?

A. Not on Beat One, no.

Q. Do you think you might be able to identify ten?

A. I don't know how many is on there.

Q. There may not be ten on there?

A. I wouldn't put any figure.

Mr. Hollingsworth: We object to that. He questioned him about percentages. Now he is trying to impeach his own witness.

Q. If your Honor please, I don't know, when it comes to the term Jury Board, naturally, they are—although we had to call them to introduce whatever testimony we are going to use. We would like to have the privilege to question them as we would any hostile witness. We certainly don't want to impeach our witnesses, but we want to adduce whatever information we need.

The Court: We have been going for some time. We are going to take a recess at this time, for about ten minutes.

(Witness excused.)

(Recess.)

(After recess court reconvened, with the defendant present in court, with counsel as before.)

MR. C. G. DARDEN: Recalled by the defendant, having been duly sworn, testified further as follows:

Redirect examination.

Mr. Hall:

Q. Mr. Darden, I understand you were on the stand before?

A. You are right.

Q. You have stated your address and occupation for the record?

A. Yes.

Q. You are Chairman of the Jury Board for this county?

A. I am.

Q. You live in Sylacauga?

A. Alabama, Talladega County, yes.

Q. How long have you been chairman for the Jury Board?

[fol. 91] A. Since 1959.

Q. As such Chairman, Mr. Darden, it is your duty to preside at meetings of the board?

A. It is.

Q. How often does your Board meet?

A. Oh, twice a year we have been meeting.

Mr. Hollingsworth: We would like the other attorney to examine this witness. He examined him before and he knows what he has testified.

Mr. Hall: All right.

Redirect examination (continued).

Mr. Billingsley:

Q. Mr. Darden, you testified before in this cause?

A. Yes.

Q. I believe you testified you lived in Beat what?

A. Whatever Sylacauga is in, I don't remember.

Q. You don't know what beat that is in? Would it be in Beat Eleven?

A. Yeah, I think it is.

Q. Do you know W. C. Aaron?

A. I have talked with him.

Q. Is he white or colored?

A. Well, talked about him I guess. I would have to —

Q. Do you know whether he is white or colored?

A. No, I don't at the present time.

Q. You have never seen him?

A. Not to my knowledge. I have talked to a lots of folks but I don't remember their names.

Q. Do you know Mr. James R. Abernathy?

A. I know of him just from the general, I know Abernathy!

Q. Do you know whether he is white or colored?

A. No.

Q. What is he, white or colored?

A. I wouldn't know.

Q. Do you know where Oldfield Road is located?

A. Yes.

Q. Do any negroes live on Oldfield Road?

A. Yes.

Q. Do any negroes live on Odeana Road?

[fol. 92] A. Oh, yeah.

Q. Do you know Mr. James H. Adams, a textile worker?

A. No.

Q. Do you know Mr. H. E. Adams?

A. No.

Q. Do you know Mr. James M. Adams, lives at 150 Walco Street or Avenue?

A. That would be colored.

Q. Do you know him?

A. Yeah.

Q. Do you know Mr. R. S. Anderson?

A. No.

Q. Do you recall some of the names you had placed on the jury roll?

A. I placed some two or three hundred in there last October.

Q. Do you recall as many as four names that you placed on this roll?

A. Not right off, I couldn't.

Q. You don't recall?

A. No.

Q. Do you have any neighbors that you place on the jury roll?

A. No close neighbors, no.

Q. Do you have any neighbors that you place on the jury roll?

A. No.

Q. Do you have any friends that you place on the jury roll?

A. No.

Q. What kind of people did you place on the jury roll?

A. The people that I checked on and went out to see.

Q. Did someone come into your store—

A. Well, I would ask about them and go out too.

Q. Were those some of your customers?

A. Not right then, probably not.

Q. Well, do you recall in your best judgment whether or not they were your customers?

A. Well, I sell paint. I don't have too many colored folks for customers, but I have a few.

Q. But you have some customers and negro customers?

A. Yeah.

Q. But you are saying you have mostly white customers?

A. (No copy)

[fol. 93] Q. Do you know Mr. Ellis Barfield?

A. Yeah.

Q. Is he white or colored?

A. He's white.

Q. Do you know Mr. Olin Barnett?

A. Where does he live?

Q. He is a mechanic, works at Sylacaugo Motors?

A. He is white.

Q. Do you know him?

A. Yeah.

Q. Do you know Mr. J. B. Bentley?

A. Where does he live?

Q. He lives on Talladega Highway and works for B & M Cleaners?

A. I know some Bentleys, I don't know whether that is his initials or not.

Q. Do you know Mr. Earl Blackaby, Jr., lives on Quarry Road?

A. I do.

Q. Is he white or colored?
A. He is white, lives in my apartment.

Q. Do you know Mr. J. F. Barkett, works at Eagle Iron & Brass Co., lives on Capitol Drive?
A. I do.

Q. Is he white or colored?
A. He is white.

Q. Do you know Mr. H. E. F. Faulton, Post Office?
A. What is the name now?

Q. H. E. Bolton?
A. He is white. Yes.

Q. Do you know Mr. J. Wood Bardford?
A. Bradford.

Q. It has got Bard here?
A. Yeah, I know him.

Q. Is he white or colored?
A. He's white.

Q. Do you know Mr. W. H. Brand works for Arnold Supply Co.?
A. I do.

[fol. 94] Q. Is he white or colored?
A. He is white.

Q. Do you know Mr. H. L. Brantley, 203 W. Milton?
A. He may be white, in that neighborhood, I don't know.

Q. Do you know Mr. J. S. Braswell, Officer manager of Brasway Finance Company or whatever that is?
A. I do.

Q. Is he white or colored?
A. He is white.

Q. Do you know Mr. Robert L. Burns, Jr.
A. Where does he live?

Q. 1503 Fairmont Road?
A. No, I don't know him personally.

Q. Do you know Mr. B. L. Butts, Coosa Newspring Five Points?
A. Not personally.

Q. Is he white or colored?
A. I wouldn't know just reading off like that.

Q. Do you know anybody named Mr. B. L. Butts?
A. No.

Q. What do you mean by you don't know him personally?

A. I know some Butts that live out in the Odeana community.

Q. They are white, aren't they?

A. The ones I know are white.

Q. Do you know Mr. Marvin J. Campbell? Manager of Sylacauga Parts Company?

A. No, I don't know him.

Q. Do you know Mr. W. M. Cannon, Foremost Dairies, 100 Maple Road?

A. No.

Q. Do you know Mr. James W. Carmichael, Coosa Newspring Company, 414 Hickory Circle?

A. No.

Q. Do you know Mr. N. F. Carmichael, Tennessee Copper Company employee?

A. No.

Q. Do you know Mr. Wesley H. Childers?

A. No.

Q. Do you know Mr. H. W. Cosper?

[fol. 95] A. No; I don't think so.

Q. Do you know Mr. J. O. Cox, 511 W. Hickory Street?

A. I don't know him.

Q. You do have a wide acquaintance in this particular beat, do you not?

A. Well, very well, not too much.

D. Do you know some negroes in that area?

A. Well, a few.

Q. You do know some negroes who might qualify for jury duty?

A. Oh, yeah, I know some.

Q. You have placed the names of some negroes on the roll?

A. Yeah.

Q. Would you examine the [redacted], for Beat Eleven, and find the names here which are negroes?

A. I wouldn't know them by just looking at them like that now.

Q. Do you know any negroes by those names?

A. I know them by George and Frog, like that boy this morning, nicknames sometimes, but as far as knowing—

Q. You don't know them by last names?

A. Well, not necessarily.

Q. Do you know anybody's last name?

A. Well, I know my own.

Q. Do you have any negroes working for you?

A. No. My store is closed now because I have to be up here. I don't have nobody working for me.

Q. Name one negro that you know who might be eligible for jury duty?

A. Lonnie Pearson, seems like his name is on there.

Q. Do you see Lonnie Pearson on this list?

A. No. Maybe that was last year.

Q. Name another negro on that beat?

A. I would have to get out and check on them before I would pass on them.

Q. But you have checked on some, haven't you?

A. Yeah.

Q. And you do recall the names of some of those you checked on?

A. Well, James Allen, he is in here.

Q. All right, name another one.

[fol. 96] A. That is a colored fellow right there.

Q. What is his name?

A. Askey.

Q. All right, name another one. Look on this page and see if you can name another one.

A. There could be some on there I wouldn't recognize.

Q. Do you see the names of any white people on there?

A. Well, I know them in business dealings and seeing them.

Q. The vast majority of these names here are the names of white persons, aren't they?

A. Sure, the majority of them are, for the majority of the people are white.

Q. What is your percentage, of population?

A. I don't have no idea.

Q. Would you say 60-40?

A. I wouldn't say anything. I wouldn't know.

Q. Do you have any idea as to whether you have as many as ten percent negroes in your population?

A. I wouldn't know the percentage for I have no reason to figure it out.

Q. Just your best judgment?

A. I would think ten percent—yes.

Mr. Hollingsworth: Your Honor, we had a stipulation with the overall figures as to the population ratio in the whole county.

Q. Have you—you said you canvassed this beat?

A. Well, I did. I talked to preachers and everybody.

Q. Did you go from house to house?

A. No, I would go to a place that I knew somebody to ask about the people.

Q. Where would you go?

A. I would go to the ones I knew just like I got those there.

Q. When did you first make up a list of this roll?

A. That was made all last year.

Q. Do you remember when this list was made up?

A. It was made up last year, the last one was turned in by September.

Q. How long did you work on your list?

A. Well, off and on all the time. I am working on it now. I talked to a negro last Saturday about somebody and he gave me one name.

Q. You make no canvass from house to house?

[fol. 97] A. Yes—no, I don't go from house to house and just knock on the door, no.

Q. Do you go and pick out so many houses in a block to go to?

A. Well, I have been around. I know at least somebody in each little section there and I talk with them.

Q. Do you check in other beats?

A. No.

Q. You do know how many beats there are in this county?

A. There are eighteen according to the evidence.

Q. You don't check but one beat?

A. No, I check three beats.

Q. What beats do you check?

A. Sycamore, Sylacauga and Winterboro.

Q. Who check the other fifteen left?

A. Well, Mr. Ellis and Mr. Moody.

Q. They split it up between them?

A. Yes.

Q. Mr. Ellis probably takes seven and—

A. I don't know. I don't remember when we divided it up I just don't remember what beats it was.

Q. Do you divide it up equally?

A. Well, as best we thought we could. I don't know whether it is equal or not.

Q. Now, this list for '61 there are no names for beats 14 or 15 and I am asking this question for information. Is there any reason you don't have any names for Beats 14 and 15?

A. Well, I don't know. What beats are those?

Q. Well, in 1959 it shows that Beat 14 was Chandlers Springs. Does such an area exist?

A. It is up in this end of the county. I don't know just where Chandlers Springs is. I have never been to Chandlers Springs. I don't know.

Q. I understand just now that they have been consolidated. Do you remember the date when the box was re-filled?

A. The first Monday in October, I think. I don't remember the date.

Q. And you don't know how many names are in this?

A. I don't have the slightest idea.

Q. Is the clerk instructed to ascertain the number of [fol. 98] names which she has in the jury list?

A. No.

Q. Does she take all the names from the jury roll and place all the names in the jury box?

A. No, the commission takes—places the names in the jury box.

Q. Well, does the commission take each and every name off of the jury roll and put it into the jury box?

A. Well, we check through it and see that they are all there. We put it in the jury box.

Q. Well, the question I am asking is whether or not, are you saying that every name which is on this jury roll re-filled October 2, 1961 is in the jury box?

A. It was that day. Of course they have been using out of it.

Q. Well, did you put all of the names in there on that date?

A. Yeah.

Q. And you did not count how many you were putting in there?

A. No, I didn't.

Q. What do you do with the names that you take out of the jury box?

A. Well, if they are too old we mark them too old and give them back to the clerk or if they are sick we mark them sick and give them to the clerk and we just leave them off the list that time.

Q. Do you mean if they are over 65?

A. Yeah.

Q. Does the law require you?

A. No, it doesn't require, if they want to stay in they can, but if they don't want to they are not required to stay in.

Q. Do you call them and ask them if they want to stay in?

A. Well, the ones I know, if they ask.

Q. Do you take all names out of the jury box at the end of every two years?

A. We take them out and check them.

Q. What do you do with those cards?

A. Well, the ones that are eligible, what is left in there, we re-work them and put them back in. If they serve, we leave them out for two years.

Q. You put them back in?

A. The ones that haven't served, that's right.

Q. Then you place them on your new jury roll the names [fol. 99] of those who have not served or some other disqualification has occurred, is that right?

A. That's right.

Q. You don't count how many names you take out of the jury box?

A. No.

Q. Well, now do you have a definite number of names you try to put in a jury box?

A. That I know of, I could all I could, but no definite number to be had, no.

Mr. Billingsley: Your Honor, I am going to ask that his statement about all he could be excluded.

Q. But you didn't check the voters list did you?

A. Well, no, I didn't have a voters list. I had the city directory and had the clubs record they gave me.

Q. Did you check with the Probate Judge to ascertain

whether or not they had a voters list that you could use to help you?

A. No, but that is not a qualification for a juror, to be a voter.

Q. We know it is not a qualification but I am asking you whether—

A. No. I had had that list there and looked that list over.

Q. When did you hav ethe list?

A. I have got one now at the house.

Q. Have you had one before that you used for the purpose of compiling the jury?

A. I have checked it a number of times.

Q. And you took some names off of the—

A. I don't recall taking any names off.

Q. That is all.

(Witness excused.)

HENRY Moody: Having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, occupation and address?

A. Henry Moody, Merchant, Childersburg.

Q. Are you a member of the jury commission of Talladega County?

A. I am.

Q. How long have you been such member?

A. Since '59 I believe.

Q. What time in '59 were you first appointed?

A. Well, now, August or September, I believe when I got my appointment.

[fol. 100] As a member of the jury commission yor are paid for your services?

A. Right.

Q. How often does that commission meet?

A. We meet twice a year.

Q. You have met in all four times since you were appointed?

A. Four or five.

Q. How long are your meetings, usually?

A. Well, sometimes they last about an hour. Sometimes longer. We don't have any set time. We just do our business and then adjourn.

Q. Have they ever lasted less than an hour?

A. No, I believe they have always lasted over an hour. I am pretty sure they have.

Q. What would you say was the longest meeting you have attended?

A. I don't know whether I could exactly say or not. We don't keep time.

Q. What time do you usually meet?

A. 1:00 o'clock, 1:30 I believe it is in the afternoon.

Q. Do you usually get through, say about 2:00 or 2:30 in the afternoon?

A. Right.

Q. These meetings have been held four or five times since your appointment?

A. I haven't kept up with it but I would think about that, maybe five or six, maybe not that many.

Q. When the Board meets, what do you do?

Mr. Hollingsworth: We are going to object to that unless he states some specific occasion. If he wants to know what they did at the time they filled the box.

Q. I'll withdraw that question, your Honor then.

Mr. Moody, what is the jury commission's function?

A. To secure eligible persons to go in the jury box.

Q. That is your sole function?

A. That's right.

Q. When your commission meets, what do you do?

A. I beg your pardon?

Q. When your commission meets, what do you do?

Mr. Hollingsworth: We object unless he shows what time. He has testified that he has met four or five times. It would be common knowledge that he didn't do last month what he did back in October, according to his testimony from the stand.

Mr. Hall: If your Honor please, the witness has testified [fol. 101] that the sole function of the commission is to

refill the jury box, and whenever they meet I assume it has to do with refilling the jury box.

The Court: I'll let him answer.

A. What do you want to know now?

Q. What you do when you meet, Mr. Moody?

A. Well, sometimes we bring in some names and the jury commission will go over these names and then we will present the list to the secretary and leave it with her.

Q. Each member of the commission brings in so many names?

A. Not at every meeting, but I think at most.

Q. At how many of those meetings has this been done?

A. I think I brought names in at three or four meetings myself, three meetings I think.

Q. Were all of those meetings in 1959 or some of them in 1960?

A. I think we had our first meeting in 1959 and had two in 1960 and one or two in '61.

Q. And the three meetings when you brought in names?

A. I couldn't tell you which meeting I brought the names in.

Q. You only attended one meeting in '59 is that correct?

A. That's right.

Q. And the two other meetings would have to be in 1960 or 1961?

A. That's right.

Q. So all three of those you brought in some more names after the list had been compiled is that right?

A. I am pretty sure I did yes.

Q. What was the purpose of those additional names?

A. It is our job to get names at all times. I work all the time trying to secure names.

Q. Do you add those names as you bring them in?

A. No, we turn them over to the secretary.

Q. She adds them as you bring them in?

A. That's right.

Q. So actually you don't get out at a given time, it is a continuing operation?

A. That's right.

Q. Whenever you bring these names in, you add them to the list?

A. That's right.

[fol. 102] Q. How do you go about getting names?

A. I use the telephone directory and I go out into the various beats and talk to some leading citizen out there or some merchant that knows the people out there. And I get some names from them. I know some people, I put those in the box.

Q. When you talk to your leading citizens, they are both white and colored(is that correct?

A. I talk to both.

Q. Where do you usually talk with those citizens, in the community where you live?

A. That's right, and out on—in the other beats.

Q. I understand you live in Childersburg?

A. That's right.

Q. Would you tell us some of the leading citizens there that you discussed this matter with?

A. I don't particularly recall any.

Q. Could you give us the name of one white citizen that you have discussed it with?

A. I don't have any idea right now. I talked to some of my customers as they would come in the store there.

Q. You operate a business of your own?

A. Yes.

Q. What is that business?

A. It is a mercantile business.

Q. And you have quite a few customers—I assume it is a large business?

A. Not too large.

Q. These persons you talked to are usually your own customers?

A. In most cases.

Q. You have both white and colored customers?

A. Right.

Q. How—do you have the names of most of these customers on this list?

A. No; I wouldn't say that. I have some on there.

Q. You have some of your customers on this list?

A. Yes.

Q. Both white and colored?

A. Right.

[fol. 103] Q. How many of your colored customers do you say you have on this list?

A. I haven't kept up with the numbers, I couldn't tell you. I wouldn't give you a number at all because I am not positive.

Q. Would you say you have a large number of your customers on here?

A. No.

Q. It wouldn't be a large number?

A. It wouldn't be a large number of either one, white or colored.

Q. Would you care to estimate the number of whites you have on this list?

A. I would be afraid to say, because I don't keep up with it. After I bring the names in and turn it over to the clerk why I am finished with it.

Q. Do you know the names of any one or two of your colored customers that you have put on this list?

A. No, not personally, right now.

Q. Now, except for canvassing your customers, what other methods do you use to get names on the jury roll?

A. I take the telephone directory and got some names that way.

Q. That would be the telephone directory for Childersburg?

A. That's right.

Q. Have you canvassed the directory for Talladega?

A. No.

Q. And Oxford, that is part of Talladega?

A. No. That is on the other side of Talladega.

Q. Lincoln?

A. That is in this county.

Q. You have canvassed that?

A. I have not.

Q. Only from Childersburg?

A. From the telephone directory, yes.

Q. What other method have you used besides the telephone directory and personal contact with your customers?

A. That is about it. I know a good many people in my community.

Q. You work full time operating your mercantile business do you not?

A. Well, I am out a day or two every once in a while. I am off any time I want off. It is my business.

Q. I have in mind, Mr. Moody that you are fully em-[fol. 104] ployed in your own business, you don't take time out sometimes to work as a jury commission and candidate in the beats, do you do that?

A. I canvass the beats that were assigned to me that I took at our first meeting of the jury commission.

Q. Do you canvass all the people?

A. No, that isn't what I said. I said at the first meeting we divided the beats up and I worked those beats that I took for mine.

Q. What are your beats?

A. Childersburg, Fayetteville, Alpine and the Lanier beats, I don't know the number of the beats. Childersburg is Beat Twelve.

Q. Alpine, what is that other one?

A. Laniers and Fayetteville.

Q. After you canvassed Fayetteville—let's see you visited—

A. I don't really canvass the community. I go to some person that knows some of the people and talk to them and they give me some ideas as to some I might put on the jury list.

Q. You yourself don't canvass it, and none of the other commissioners canvass it because this is your territory!

A. That's right.

Q. The clerk doesn't canvass it?

A. No.

Q. The clerk makes no survey of your territory?

A. No.

Q. I'll show you a jury roll for Talladega County which we have stipulated is the only jury roll present in this courtroom and I want you to examine it and explain something to me if you will. Directing your attention to a particular page of this jury roll captioned Beat Five, Talladega, October, 1961. I'll show you the name of William E. Barton, Jr., whose occupation is listed here as Newbury Manufacturing Company, residence address given at 306 E. South Street, Talladega. I'll suggest to you, sir, that that is written in ink, when the body of—or the most of the names on this roll are typed. Can you tell me why that is written in here in ink.

Mr. Love: We object to that, if the Court please. That is the secretary's handwriting and the secretary's entry.

The Court: He can testify if he knows.

Q. Your Honor we asked if he could tell us.

[fol. 105] The Court: I have overruled.

A. Tell you why? No. It is not my duty to write anything in the book.

Q. You do examine the roll from time to time?

A. Yes.

Q. You are a member of the commission?

A. Yes.

Q. Your commission does set policy?

A. Yes.

Q. Your commission does employ the clerk?

A. That's right.

Q. Your commission does supervise her work?

A. That's right.

Q. And instruct her in her duties?

A. That's right.

Q. I'll direct your attention to the same place, to the same page of this jury roll captioned Beat Five, Talladega October, 1961. I'll show you the name of—I don't know what this is—Cahona. Alfred, C-g-h-o-n-a.

A. That is Cabana.

Q. His occupation is Bachman-Unbridge. His address is 4109 Brown Street, Talladega. I will tell you there is written on this page in pencil and the other entries are all typed in. I'll ask you if you can tell me why that is written in in pencil?

A. I cannot.

Q. I'll ask you to go through this book page by page and find if it is not a fact that there are two to three names on each page, among two-four-six-eight-ten-twelve, fourteen-sixteen-eighteen-twenty-twenty-four—twenty-six—twenty-eight—thirty—there are are 42 names on each page. But on each page there are one, two or three written in either pen or pencil and the others are typed. You know of no reason why some of these names are written into this record or made in pen and pencil while the majority of them are typed?

A. No, unless—no, I wouldn't know.

Q. You will observe further sir that they are not written on regular lines but between lines, indicating that they were inserted after the page had been finished and not on regular lines?

A. I am sure she had a reason for doing it.

Q. But to your knowledge they were not done in regular meeting or according to any instructions from your commission?

[fol. 106] A. It wasn't done at a regular meeting, no.

Q. It has not been explained to you so far as you know?

A. No.

Q. Do you know of your own knowledge there are some negroes on the jury roll of Talladega County?

A. Yes, sir.

Q. How do you know?

A. I know there are some on there.

Q. How do you know it?

A. I put them on there.

Q. Can you name some that you put on there?

A. I am pretty sure I could if I could think about it. In other words, in securing names I don't watch the color line.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. You said you brought names from time to time. Have you brought any names up and given them to Mrs. Young in the presence of the board or at any other time since the box was refilled the last time in October of 1961?

A. I am not positive. It seems like I brought a small list but I am not positive.

Q. Do you of your own knowledge know whether or *the* not the names that you brought up here after October 2, 1961, assuming that you did bring some, do you know whether or not they were put in the current docket, that is on the cards that are in the box today, or were they put on inactive.

A. If they were brought before September 15th, I believe, we tried to get them in so that we could get them

typed up and everything, so they could go in the box. I haven't brought any since about September 15th.

Q. You brought those names up here to be added to any list?

A. No, since then. That's right. I'm pretty sure that is right.

Q. After this box was refilled in 1961 you all are still working on this inactive box are you not, or docket so that the list will be ready two years from the time, of October, 1963?

A. That's right.

Q. I believe that is all.

[fol. 107] Redirect examination.

Mr. Hall:

Q. Has your commission ever arranged for surveys of this county, as such, to ascertain the names of persons who might be eligible for jury service?

A. I didn't understand the question.

Q. Has your commission ever arranged for any survey of this county in order to ascertain the names of persons who might be eligible for jury service?

A. No.

Q. That is all.

(Witness excused.)

TIMOTHY COLEMAN: Having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name and address?

A. Name, Timothy Coleman. 504 Knox Street.

Q. What do you do for a living?

A. I work construction work at Wilsonville.

Q. How long have you lived here in Talladega County?

A. All my life, mostly.

Q. How old are you now?

A. Fifty-three.

Q. Have you ever been arrested or convicted of a felony, Mr. Coleman?

A. No.

Q. You know what a felony is, that is a crime calling for at least a year or longer in jail?

A. No.

Q. Have you?

A. No.

Q. Do you own any real property?

A. Yeah, a lot.

Q. Can you read and write?

A. Yes.

Q. Do you vote?

A. No.

Q. You are steadily and regularly employed?

A. That's right.

[fol. 108] Q. You have been most, during your adult life here?

A. That's right. While I wasn't in the army. I spent part of it in the army.

Q. You are a veteran?

A. That's right.

Q. You were in the army during which war?

A. World War Two.

Q. Honorably discharged from the services?

A. '45.

Q. You were honorably discharged?

A. That's right.

Q. Have you ever been summonsed to serve as a juror in this county?

A. No, sir.

Q. You never have?

A. No, sir.

Q. Do you have any brothers?

A. Yes, sir.

Q. Do they live in Talladega County?

A. One do.

Q. Is he an adult, is he a man over 21?

A. Yes, sir.

Q. Has he ever been arrested or convicted of any serious crime?

A. Not as I know of.

Q. Do you know whether or not he has ever been called to serve?

A. Yes, he a veteran.

Q. He has?

A. Yes, sir.

Q. Did he serve as a juror?

A. How is that.

Q. Did you say, yes, he has been called as a juror?

A. No, not as I know of.

Mr. Hollingsworth: We object to this unless he has been with him all the time because he wouldn't know unless he came to town with him or where he went.

Q. Do you belong to any Lodge or fraternal organization?

A. Church is the only one.

Q. Do you belong to any of the fraternal groups, the Masons, Elks or Moose?

[fol. 109] A. No.

Q. Are you widely acquainted in your neighborhood, do you know many negroes?

A. Quite a few of them out where I live.

Q. Where do you live?

A. Knoxville.

Q. Knoxville, where is that?

A. Right out here. (indicating)

Q. In Talladega County?

A. That's right.

Q. Outside the city limits?

A. Inside.

Q. Do you know of any negroes out there where you live who have ever served as a juror?

A. Charlie Cole.

Q. That is one. That is the only one?

A. The only one I know.

Q. You yourself have never been called?

A. No.

Q. That is all.

Cross-examination.

Mr : Hollingsworth:

Q. How old are you?

A. 53.

Q. And you served in World War One?

A. That's right.

Q. When was World War over?

A. World War Two.

Q. I thought you said World War One?

A. World War Two.

Q. How long have you been living in Knoxville?

A. About seven or eight years.

Q. Do you know Adolphus Coleman?

A. That's right.

Q. Is he any kin to you?

A. First cousin.

Q. Do you know whether or not he has ever been up here on jury duty?

[fol. 110] A. He back there now.

Q. Do you know of your own personal knowledge whether he has ever been up here or not?

A. I don't know.

Q. Do you know Arthur Coleman?

A. No, sir.

Q. I believe he is now deceased. Do you know a barber who lives on 602 Knox Street, Talladega, Alabama?

A. No.

Q. Isn't he dead now?

A. I just don't know.

Q. Isn't he the barber, used to cut hair down here on East Street?

A. I said, I couldn't tell you. I don't know.

Q. Did you know Arthur Coleman during his lifetime?

A. No.

Q. Do you know where 602 Knox Street?

A. I live on 504 Knox Street.

Q. That would be within a block, wouldn't it?

A. I don't know.

Q. That is all.

(Witness excused.)

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CLEMSON CALHOUN: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name and address, please?

A. Clemson Calhoun, Alpine, Alabama, Route Two, Box 89 in Talladega County. I farm.

Q. How long have you lived there?

A. Fifty years.

Q. You have lived there all your life?

A. Yes, sir.

Q. Did your father live there before you?

A. Yes.

Q. Have you ever been convicted of any crime, any felony?

A. Naw.

Q. Have you ever been arrested and charged with crime?
[fol. 111] A. Well—

Q. You will have to speak up so that we can hear you?

A. I paid Four dollar fine for running a stop sign.

Q. That is the only arrest you have had?

A. Yes.

Q. Do you own that farm?

A. Yes.

Q. Can you read and write?

A. Yes.

Q. The English language?

A. Yes.

Q. Have you ever been called as a juror?

A. No, I haven't.

Q. You never have been subpoenaed to serve as a juror since you have been out there in Alpine?

A. No, I haven't.

Q. What beat in Alpine in?

A. Beat Eight.

Q. You have been in the courtroom while the jury commission has testified?

A. Yes.

Q. Have any of them ever come to you or canvassed you or talked with you about serving as a juror?

A. No.

Q. Anybody ever write you a letter or sent you a form or inquire in any way about your willingness to serve as a juror in this county?

A. No.

Q. Do you have any brother that live out there with you?

A. One.

Q. How old is he?

A. About 67.

Q. Has he ever been convicted of any felonious crime?

A. No, I don't know.

Q. Are there any negroes who live in Alpine?

A. Yeah, its lot of them.

Q. Wha tsection of Talladega County is Alpine?
[fol. 112] A. Kinda southwest from here.

Q. Would you say there are more negroes in Alpine than whites?

Mr. Hollingsworth: We are going to object to that.

A. I wouldn't know that.

Q. But you do know that there are a large number of negroes out there?

A. Yes.

Q. Are you acquainted with many negroes who live in Alpine?

A. Quite a few of them.

Q. Would you say that you knew most of them?

A. Well, yeah. I know more of them, most of them, but I wouldn't just know them all personally by name.

Q. Do you know whether any of them have ever served on a jury or not in this county?

A. Naw, I wouldn't know that.

Q. Have you ever had any of them tell you that he had so served?

A. No, I haven't.

Q. If any negro in your community had served on a jury in Talladega County, is it not a fact that he would have communicated that fact to the neighborhood immediately?

Mr. Hollingsworth: We object to that.

The Court: I'll sustain.

Q. We want an exception, your Honor. Have you ever had any relatives or friends who served on a jury in this county?

A. Yeah, I think so.

Q. Who.

A. They have been called up here. I guess they served.

Q. Do you know of anyone, any relative or friend who served on a jury in this county. I don't want your thinking or guessing. If you know?

A. Yeah, Ovell Calhoun.

Q. Is he a friend of yours?

A. Naw. He's my nephew.

Q. When did he serve on a jury?

A. I don't know when it was but I know he served.

Q. Do you know of any other negroes who served on a jury in this county?

A. Naw.

Q. Do you know whether Calhoun served on a grand or petit jury?

[fol. 113] A. I don't know what it was.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. Is your health good?

A. No, it is not any good.

Q. What is the trouble with your health?

A. I have sugar and I have gland trouble.

Q. In other words, you have sugar diabetes?

A. Yes, sir, and I have kidney trouble.

Q. What kind of gland trouble do you have?

A. Prostate gland trouble.

Q. Does it interfere with your work?

A. Yes, sir, I can't do nothing much.

Q. That is all.

Redirect examination.

Mr. Hall:

Q. How long have you had that trouble?

A. Ever since '42.

Q. Ten years. You were forty years old when you first got it?

A. It was '42 when I discovered it. It was twenty years ago.

Q. Since that time have you been operating your farm?

A. No, I am out there on it, but I don't do the operating.

Q. Your health hasn't been good?

A. No.

Q. That is all.

(Witness excused.)

A. K. Wood: Having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. Is this Mr. A. K. Wood, Circuit Clerk of Talladega County?

A. I am.

Q. How long have you been Clerk in this county?

A. Sixteen years.

Q. As such clerk have you attended Court from time to time?

A. Yes.

Q. And observed jury trials in this circuit?

[fol. 114] A. I have.

Q. During that sixteen year period, have you ever known a negro to serve on a petit jury in this county?

A. I have not.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. Mr. Wood, have you ever known them to serve on a grand jury in this county?

A. Nearly all of them.

Q. The grand jury which indicted the defendant in this

egse, do you know of your own personal knowledge whether or not any negroes were on that particular grand jury?

A. It was either four or five on the jury list and two of them served.

Q. I'll ask you, do you know Samuel Chapman?

A. The one that was convicted?

Q. Is Samuel Chapman here now. I'll ask that he stand up. I'll ask you to observe that man there and I'll ask you, do you know whether or not he was one of the ones that served on the grand jury that indicted the defendant in this case?

A. I couldn't swear to that.

Q. Do you have your records as to who served?

A. Yes, sir.

Q. Step in there and get it please sir.

(The witness left the witness stand, and returned and resumed the witness stand)

Q. Is that the set of cards that was on the grand jury?

A. Yes, sir.

Q. I'll ask you to go through them and see whether or not Samuel P. Chatman's name was on that grand jury?

If you don't mind, just read them out.

A. Yes. Ira J. Freeman, who was the Foreman, A. C. Dalton—

Q. (interrupting) Read everything that is on the card?

A. I have it here. A. C. Dalton, Textile, Bemiston; Thomas Hutton, Textile, Bemiston; Lester L. Hanks, Coosa River Newsprint; Clarence B. Hepson, Payroll, Coosa River Newsprint; Clarence Pettis, Farmer, Route One, Box 160, Eastaboga; Robert Baker, Coosa River Newsprint; John M. Carr, Farmer, Renfroe; public works; Harvey Dulaney, Farmer, Munford; M. P. Granger; William E. Brownlow; James E. Adams; Robert Irving; Jack Nabors; David E. Horn; Ira Rhodes; and Sam P. Chapman; Rube Freeman. [fol. 115] Q. Wait a minute, that is not Ira Rhodes?

A. Ira Rhoden.

Q. Is John Rhoden here today?

Mr. Billingsley: Your Honor, we are going to object to that. The witness can testify. I think he has already called the names.

We withdraw that.

Q. It is in the record. It is not in dispute. Do you tell the Court that out of these eighteen there were two negroes that served on the jury, is that correct?

A. That's right.

Q. On the grand jury?

A. Yes, sir.

Q. Do you know of your own knowledge when the roll was called how many negroes answered the roll?

A. Either four or five. I couldn't swear which, but I believe it was five.

Q. Do you—can you tell us by this, how many were left to be drawn from—let me ask you this. When they were excused in open court, did you mark them excused on the list?

A. Yes.

Q. Could you count them and tell how many was drawn from, that is, how many names were left in the hat?

A. Yes, sir, thirty-three.

Mr. Hall: Thirty three negroes.

Q. Of that group I believe you testified there were either four or five negroes?

A. Either four or five, yes, sir.

Q. Now, Mr. Wood, have you seen this jury venires, all jury venires that have been brought in here Mondays, for the past few years, that is going back through 1953?

A. I have.

Q. Have you had the occasion to see negro jurors on those venires?

A. I have.

Q. What is the most negroes you have seen on any one venire?

A. Eighteen I believe.

Q. Have you seen any venires without any negroes on them?

A. Very few if any.

Q. Do you recall seeing a one since 1953 that didn't have negroes on the venire?

A. I don't think I have.

[fol. 116] Q. Yes or no. Do you recall seeing a venire up here without negroes on it?

A. If it has, it hasn't been over one, I will say.

Q. Do you remember there being one?

A. No, there are usually two or three or six or seven. One time it was eleven.

Q. Do you remember there ever being a jury venire in here without a negro on it?

A. Not more than one, if it has.

Q. Do you remember one, Mr. Wood?

A. I don't think so.

Q. Do you remember ever seeing one, since 1953, in here, without a negro on it?

A. I don't think so.

Q. I believe that is all.

Redirect examination.

Mr. Hall:

Q. Mr. Wood, since 1953, have you ever seen a petit jury with one negro on it?

A. No, I haven't.

Q. Not on the trial of any case in Talladega County, Alabama?

A. No. They get struck.

Q. Do you know of any negro ever having served on a petit jury in Talladega County in the last fifty years?

A. Well, I wouldn't say about that.

Q. Is there any record of it?

A. I don't know. I haven't examined the records.

Q. You have seen them on the venire but they never get in the jury box?

A. They get struck by the lawyers on both sides.

Q. That is all.

(Witness excused.)

CHARLES MOORE: having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, address and occupation?

A. Charles Moore, 824 West Battle Street, Decorator.

Q. Are you a native of Talladega County?

A. This has been my home since I was about eight.

Q. You have lived here since you were eight?

A. Yes.

Q. How many years is that?

[fol. 117] A. About forty, more or less.

Q. Are you a property owner in this county?

A. Yes.

Q. Are you a registered voter in this county?

A. Yes, I am.

Q. You do read and write the English language?

A. Yes.

Q. Have you ever been convicted of any felonious crimes?

A. No.

Q. Have you ever served as a juror in this county?

A. No.

Q. Have you ever been called for service as a juror in this county?

A. Yes.

Q. When was that?

A. I don't know. I couldn't say the exact year.

Q. Could you give us your best judgment?

A. It would probably be—well; I have been called twice.

Q. Can you tell us when those times were?

A. One was more recently, I guess it was three or four years ago and one was probably eight years ago.

Q. The last time was four years ago?

A. Something like that.

Q. You were called previous to that eight years ago?

A. Something like that.

Q. You haven't been called in the last four years?

A. I couldn't say exactly but to my knowledge. I mean I just don't know the years I was called. I'll put it like that.

Q. But both times you were called you were excused, or did you serve?

A. I didn't serve. I was excused.

Q. At your request?

A. No, not at my request, I stayed it out each time.

Q. I see. You came in and in answer to your subpoena?

A. Yes.

Q. You presented yourself, you remained here during the time required?

A. Yes.

[fol. 118] Q. But you were not used as a juror?

A. I was excused each time.

Q. Let see if I understand what you mean by excused. Would you tell us what happened?

A. Well, once I was here, I don't know whether it was first or second time, I stayed one day and—oh, I guess I was here probably an hour and I was excused that time.

Q. How do you mean you were excused?

A. Well, after they strike the jury—I mean go through the procedure—then after the jury is picked, well if you are not needed, if you haven't been chosen to serve on the jury, then they tell you to go by the clerk's office and pick up your check. So that is it.

Q. On Monday you presented yourself?

A. Yes.

Q. Together with a group of other men. Do you know how many were in that group of men?

A. No, I don't.

Q. Could you give us your best judgment as to that number of persons present for jury duty?

A. You mean the whole group.

Q. Of people present for jury service?

A. Oh, it was many. I wouldn't have no idea.

Q. Were there any other negroes here?

A. As I remember it was.

Q. How many?

A. I don't know.

Q. After you had remained an hour, what happened during that hour now?

A. Well, as I remember, all the names were put in a hat and drawn out and the names were called—well, on one of these occasions, during that time I was asked to come up here and give my name, and occupation and that was about it. Then—

Q. Wait just a minute. When you were asked to come up and give your name and occupation, then what happened?

A. Well, I was asked to come back the next day at a set hour, I don't remember just what hour, probably nine o'clock the next day.

Q. Did you come?

A. Yes.

Q. Then what happened?

A. Well, I was asked to come back the next day at 1:00 o'clock.

[fol. 119] Q. Did you come?

A. Yes.

Q. Then what happened?

A. I stayed here about thirty minutes and then my name was called, that I could go by the clerk's office and pick up my check.

Q. You were not used as a juror?

A. No.

Q. Were any of the negroes used who were here, to your knowledge?

A. No. To my knowledge, no.

Q. Have you even known of any negro being used on a petit jury in this county?

A. No.

Q. Are you widely acquainted among negroes in this county?

A. I have been here practically all my life. I wouldn't say I was well acquainted, but I know some negroes!

Q. Do you know of any among your acquaintances who have ever served on a petit jury?

A. No.

Q. Do you know any who have served on a grand jury?

A. Yes, I knew one.

Q. Who was that one?

A. His name was Doug Jenkins, it has been several years ago. I think since that time he has passed.

Q. That is the only negro you know of who has ever served on a grand jury?

A. That is the only negro I know.

Q. Are you a member of any of the lodges or fraternities?

A. No.

Q. Do you belong to a local church?

A. A local church.

Q. That is all.

Mr. Hollingsworth: No questions.

(Witness excused.)

A. D. SMITH: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, address and occupation?

A. A. D. Smith, 440 North Street, West, Talladega, Alabama.

Q. How long have you lived in Talladega County?
[fol. 120] A. I was born in Talladega County.

Q. How old are you now?

A. Seventy years old.

Q. What do you do for a living?

A. Minister.

Q. You are a minister of the gospel?

A. Yes, sir.

Q. Have you always been a minister during your manhood?

A. Fifty years.

Q. Have you ever been convicted of any felony, or any crime at all?

A. I have.

Q. What was that?

A. I was thinking—I have been arrested.

Q. You have been arrested and accused of crime?

A. But never have been convicted.

Q. What were you arrested for?

A. Well, at that time I was in the government reservation in Johnson City, Tennessee, and me and a white gentleman was getting junk, he was selling out, and so they come and arrested everybody that had any parts around there and so they carried me on and the fellow that with me and put me in jail and we were in jail all night, but we wasn't convicted and we was turned loose.

Q. In other words, you never were fined or punished?

A. No, sir, never was.

Q. Have you ever served as a juror in this county?

A. Well, I haven't served.

Q. Have you ever been called to come up here and serve as a juror?

A. I have never been called in my recollection.

Q. Would you talk a little bit louder please. Do you have any sons?

A. I have no son that I know about.

Q. That is all.

Mr. Hollingsworth: We have no questions.

(Witness excused.)

[fol. 121] TAYLOR CHRISTIAN: Having been by the court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name and address and occupation?

A. Taylor Christian. 619 McKinley.

Q. What do you do for a living?

A. I just work about and plows, that's all.

Q. How old are you?

A. 72 years old the 27th of June.

Q. How long have you lived in Talladega County?

A. Well, practically, nearly all my life, I will just say.

Q. Well, have you lived here continuously for the last 30 or 40 years?

A. Yes, siree.

Q. Do you own any property?

A. Yes, sir.

Q. Can you read and write?

A. A little bit.

Q. Have you ever been convicted of any crime?

A. Never in my life.

Q. Have you ever served on a jury in this county?

A. Never in my life.

Q. Have you ever been called to serve on a jury here in this county?

A. Never in my life.

Q. Do you know of any negro who has served on a jury in this county?

A. Well, I'll just have to think for a while. I couldn't tell it now.

Q. You are a negro yourself, are you not?
A. That's right.
Q. You are?
A. That's right.
Q. That's all.

Cross-examination.

Mr. Hollingsworth:

Q. Are you able bodied at this time?
A. Able bodied?
Q. Are you in good physical health?
A. Well, fairly good. Fairly good.
Q. Are you under the care of a doctor?
[fol. 122] A. Not now.
Q. Have you been in the past year or two?
A. Two weeks ago I were in the bed for a week.
Q. What is your trouble?
A. Got too hot.
Q. You had a sun stroke or something?
A. I imagine so. I was working.
Q. Do you know a man by the name of W. M. Christian,
a colored man?
A. My brother.
Q. Do you know of your own personal knowledge whether
he has ever been called for jury duty?
A. Not to my remembrance, never.
Q. You don't recall back in October 10, 1960, him being
called. Do you all live together?
A. No he lives on Coosa and I live on McKinley.
Q. In other words, you don't know whether he came up
here or not as a juror, do you?
A. He was up here yesterday.
Q. I know. That was the subject of the subpoena of the
movants in this particular action.
A. I see.
Q. Do you know whether he ever attended court here
because he had been subpoenaed as a juror?
A. Not that I know of, no, sir.
Q. We have no more questions.

Redirect examination.

Mr. Hall:

Q. What beat do you live in, Mr. Christian?

A. Let me see. Let me see.

Mr. Hollingsworth: We will stipulate that it is Beat Five.

A. Yes, sir. I believe that is right. It is Beat Five.

Q. Your brother lives in Talladega too, is that right?

A. Yes, sir.

Q. You have never been called down here to the court-house to serve as a juror?

A. Never in my life.

Q. You have lived here in Talladega County how many years, consecutively.

A. Oh, Lord, I tell you the truth, I have been around Talladega here for the last—I will say sixty years.

[fol. 123] Q. During that time you have never—

A. Never.

Q. —been asked to serve as a juror?

A. Never. Never. And I never even had a fight in my life.

Q. During that time have you always been a property owner?

A. Tried my best, yes, sir.

Q. That is all.

(Witness excused.)

BEN REYNOLDS: Having been by the court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, address and occupation, and talk into the microphone so that we can hear you.

A. Ben Reynolds, Childersburg. Farming is my occupation.

Q. How long have you lived in Childersburg?

A. I was born about four miles above Childersburg.

Q. How long have you stayed there?

A. I stay there now. I have been there sixty years.

Q. Do you own that property?

A. Yeah, I own it.

Q. How long have you owned it?

A. I been owning property—my father owned property there when he was living, and he passed and we bought property. I been owning it all my life.

Q. You have owned some real estate all your life?

A. Yes, sir.

Q. Childersburg is in Talladega County, is it not?

A. That's right.

Q: Have you ever been convicted of any crime in this county?

A. No.

Q. Have you ever been accused of any serious crime?

A. No.

Q. Have you ever been summonsed to serve as a juror?

A. I have been summonsed.

Q. When was that?

A. Oh, about two years ago.

[fol. 124] Q. Did you present yourself for service?

A. Sure, yeah.

Q. Were you used as a juror?

A. No.

Q. Did you ask to be excused?

A. No. They knocked me out.

Q. What do you mean when you said they knocked you out?

A. When the- classified the jurymen they cut me off.

Mr. Hollingsworth: May it please the court we would like for him to explain that a little further, using that terminology, knocking him out and cutting him off.

Q. Your Honor, we will see if we can get him to explain it. If not, he can bring out whatever he wants brought out!

Tell me, you came down on Monday of the week that you were requested to show up?

A. Sure.

Q. Were there other persons who came in answer to such summons to serve as jurors? Do you know approximately how many other people came at that time?

A. Well, there was another colored fellow on there with me but I didn't know his name.

Q. One other colored man?

A. Yeah.

Q. How many white men in your best judgment?

A. There were two colored; the rest was white.

Q. When you say the rest, how many was that? In your best judgment?

A. I think it was ten.

Q. There were no more than ten?

A. White.

Q. That was before they picked the jury?

A. Well, they had picked the jury at that time.

Q. But you were not selected to serve on this jury?

A. No.

Q. Was the other colored selected to serve?

A. No, he was knocked off too.

Q. Do you know of any negro who has ever served on a jury in this county?

A. I do not know.

Q. You read and write the English language, do you not?

A. Yeah.

Q. That's all.

[fol. 125] Cross-examination.

Mr. Hollingsworth:

Q. You are Ben L. Reynolds, Sr. or Ben L. Reynolds, Jr.?

A. I am Ben L. Reynolds, Sr.

Q. May it please the court, for the record, on the jury roll for Talladega County, kept by the jury commission, we would like to call the court's attention to Beat 12, Childersburg, October, 1961 wherein the name Ben L. Reynolds, Sr., Farmer, Kymulga Road, Childersburg, appears thereon.

Do you live on Kymulga Road?

A. That's right.

Q. And you have a son named Ben L. Reynolds, Jr.?

A. Yeah.

Q. Is he a farmer?

A. Yes, sir.

Q. Does he live on the Kymulga Road too?

A. Yea, he lives on the Kymulga Road too.

Q. In Childersburg?

A. That's right.

Q. We would like for the record to show that he too appears on this list below his father.

Do you know of your own knowledge whether your son has ever been called up here for jury duty?

A. I don't know of it if he has been called.

Q. What age man is your son?

A. He is about 23.

Q. How many times have you been subpoenaed for court as a juror?

A. Twice.

Q. The first time when you came up do you know whether they were selecting a jury to try cases?

A. (interrupting) Well.

Q. Let me explain it to you. This is the jury box over here?

A. That's right.

Q. Did they select juries and put them in this box for Monday, Tuesday, Wednesday, Thursday and Friday?

A. That's right.

Q. The second time you came up were they selecting petit juries?

[fol. 126] A. This was petit jury that they had me.

Q. Well, now they have petit juries for civil and for criminal. The grand jury is different.

Now, let me ask you the second occasion was the jury duty in this box or was it the grand jury?

A. They had us in that box.

Q. Qualifying you?

A. Yes, sir.

Q. Asking you questions?

A. Yes, sir.

Q. The lawyers would ask you different questions?

A. That's right.

Q. Now the colored people were put in the box the same as the white people?

A. That's right.

Q. And the same questions that were asked the negroes were asked to the whites?

A. Yes.

Q. And all the lawyers in the cases had opportunity to ask any questions they wanted of the venire, did they not?

A. That's right.

Q. Then the juries were struck and you tell the court that you did not get selected for any particular jury that week?

A. No.

Q. The preliminary questions that were asked of all the jurors, the same questions were asked of you on that particular occasion, were they not?

A. Yes.

Q. That is all.

Redirect examination.

Mr. Hall:

Q. The first time you were up here to serve as a juror, when was that, do you recall?

A. About two years ago.

Q. That was the time when you said there was one other colored man here?

A. Yeah, that's right.

Q. When was the second time?

A. I don't believe it was but one time they had me up here for petit jury.

Q. Did they have you up here for a grand jury?

A. They had me for a grand jury but they didn't use me. [fol. 127] Q. When was that?

A. It was two or three years ago.

Q. How many negroes were there then?

A. I never did get there to see them all. There was several out there in the hall. When they went in the room they told me that they won't use me and I could get my money and I went on and got my money and went home.

Q. Will you explain that for us. What do you mean, you were in the hall? When you came to report for jury service?

A. That's right.

Q. Where were you?

A. I was in the jury room up there.

Q. In the jury room?

A. Uh, huh.

Q. Everybody reports in the jury room?

A. Yeah.

Q. Then they select persons to serve?

A. I never did get in there.

Q. You didn't get into the jury room?

A. Uh, huh.

Q. Did you see them draw cards out of the box or hat?

A. No, I didn't see anything.

Q. You were not in the presence of the court when the jury was drawn?

A. No.

Mr. Hollingsworth: We move to exclude his testimony that a jury was drawn unless he was in here and knows that it was. I submit, your Honor, he is mistaken.

The Court: Question him about it.

Q. Tell us, in your best judgment what did happen?

A. I don't know what happened now.

Q. But you came in answer to a subpoena?

A. Yes.

Q. Where did you report?

A. I reported up there to the jury where they was.

Q. To the jury room?

A. They told me they wasn't going to use me and I got my money and went home.

Q. When you say up there to the jury room, what place do you have reference to?

[fol. 128]. A. What place it was?

Q. Yes, was it a place in this courthouse where you reported?

A. Yeah.

Q. Your reported to this courtroom?

A. No, I didn't report here.

Q. Did you go into a courtroom at all?

A. Well I didn't go no further than the hall?

Q. When you got to the hall, do you know who told you you wouldn't be needed?

A. No, I do not.

Q. But they told you you would not be used?

A. Yeah.

Q. You were directed to go by the clerk's office to get your money?

A. Yeah.

Q. Was that on the first day you reported?

A. That was when I reported for juror. When I reported for petit juror it was over here.

Q. You came in this courtroom?

A. Uh, huh.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. The occasion you are talking about, were you subpoenaed as a witness in some cause or were you subpoenaed as a juror?

A. At that time they had me *suspended* for juror.

Q. Are you familiar with this courtroom, this courthouse?

A. Well, pretty—I haven't been here ~~but~~ several times.

Q. For the record, attorneys, would you agree that this courthouse up here has been in this same condition since 1953, at the time in 1952 when it was re-worked.

Mr. Hall: Mr. Hollingsworth, I can't. I don't know.

Mr. Hollingsworth: Could we have a stipulation from the court.

Mr. Hall: The court can take judicial notice.

Mr. Hollingsworth: Your Honor, will you stipulate it for the record so that I won't have to put a witness on to show it.

The Court: Unless they agreed to it I would be in the position of testifying.

Q. Did you come upstairs on that occasion?

A. Yes, sir.

Q. When you came upstairs where did you go?

[fol. 129] A. I went to a room up there where the jurors was.

Q. All right, I want you to come out in the hallway out here. Would one of you attorneys come with us.

(The witness left the courtroom in the company of Mr. Hollingsworth and Mr. Billingsley, and returned to the courtroom where the witness resumed the witness stand)

Q. All right, now, in the company of Orzell Billingsley, Jr., did you have occasion to walk over the top floor of the courthouse, since we stepped out of the courtroom?

Did you just walk over the top floor of the courthouse?

A. Yes.

Q. And for the record we would like this to be shown in the record, that there are two flights of stairs coming up to the second story of the courthouse, on the south side: As you come, on the right side is located the Circuit Clerk's office, and then you come down a hall and the first room on the right is a jury room, the next room is the office of the court reporter, (the jury room I just referred to is a jury deliberation room, that's right,) the next office is the circuit judge, the next room is a supply room, which was constructed for a cell; the next two offices, the corner office and the one adjacent thereto are the offices of the Probation and Parole officers; the next two offices are reception room and office of the Circuit Solicitor. Then the corner room is the grand jury room.

Now, as you come up the stairs on the left, at the top of the stairs is the Register's office, consisting of one room. That in the center of the stairway, the two stairways leading upstairs, is a small corridor leading into the circuit courtroom, which seats approximately 300 people. After you enter the courtroom, coming through the corridor, you come into the circuit courtroom and turn right, there is a law library, approximately 30 by 30 feet. Adjacent to the circuit courtroom is the intermediate courtroom which is approximately one fourth the size of the circuit courtroom.

Now, you were shown these particular places when you were taken out by the solicitor and your attorney, were you not?

A. Yes, sir.

Q. Now, after you have seen these places do you recognize the place that you went to when you testified to your lawyer that you went in a jury room or a room and waited, do you recognize any of these places as being the place where you went?

A. I went—after they told me they couldn't use me—they couldn't use me.

Q. Just answer my question. When you came up here with your subpoena where did you go?

[fol. 130] A. I was here or down floor.

Q. I didn't understand you. Where did you come when you got up here with your subpoena the morning that you are testifying about?

A. I came up here.

Q. You came up—let the record show there are three floors in this courthouse. One is the basement, one is the ground floor where there is the Veteran's office, the blind boy has a coco cola and candy shop, the Sheriff's office, the Tax Collector's office, the Tax Assessor's office on the left side of the hall. On the right side of the hall as you come in the south end, of course you have the stairs leading upstairs, you have the Commissioner's Court room, the Probate Judge's office and the vault on the right side.

A. I think this here was the place that I came into that morning.

Q. Is it your best judgment that you came into this courtroom?

A. This courtroom here where the jurymen was supposed to go.

Q. Did you take a seat out here in the front, out where these people are seated out here now?

A. Seems like we were sitting out here.

Q. How many years ago has that been?

A. Oh, that has been six or seven years ago.

Q. Was your name called out that morning by anybody here?

A. Yeah, I stood up.

Q. Let me ask you. To refresh your recollection did the man who called your name, was he seated over here on the lefthand side of the judge?

A. Who is that. Mr. Wood?

Q. That's right.

A. I think it was Mr. Wood.

Q. Do you know Mr. Arthur Wood?

A. I stood up I think.

Q. Did he call your name and you stood up?

A. Yeah.

Q. Did he tell them all when he called their name to stand up?

A. Seems like he did.

Q. In other words, the white and colored stood up at that time?

A. Yes. This is the place.

Q. Was that for grand jury service or was that—

A. Yeah, that was grand jury.

[fol. 131] Q. Let me ask you while I'm thinking about it. Did you see, after the names were all called, some of the people excused?

A. Well, yeah.

Q. Before you were excused did you ever see the judge take a hat and put all the cards in the hat and shake them up and reach down in it and pull out the cards and then call the names and seat 18 men over here and then excuse the balance of them and tell them they had performed their duty as jurors for the week and that they were free to go by the clerk's office and draw their pay?

A. Yeah.

Q. Is that what happened on that occasion?

A. That's what happened, something like that.

Q. In other words, do you recall whether or not they filled up these twelve seats here and then put six more chairs in front?

A. That's right.

Q. That was the grand jury, was it not?

A. No, that was petit jury over there, wasn't it, to try cases. Wasn't it?

Q. You are the one who is testifying. I don't know what you are talking about?

A. Yeah, that would be petit jury.

Q. How long did you stay up here the time you came for the grand jury?

A. I went back the same day.

Q. Did you get through by 10:00 or 11:00 o'clock?

A. Yeah, I went back that day.

Q. There was only one jury pulled on that occasion, wasn't there? If you don't remember, just say you don't remember?

A. I don't remember now. I know I was sitting in those chairs over there that day.

Q. You have never served on a grand jury?

A. No.

Q. That's all.

Redirect examination.

Mr. Hall:

Q. When you say you sat in one of those chairs over there, are you pointing to the jury box, are you not?

A. Yeah, jury box.

Q. How did you get in one of those chairs over there

A. They called me and put me in one of those chairs.

Q. You were over there with some other men who had been called and put in the jury box?

[fol. 132] A. One more colored and the rest was white.

Q. All of you sat over there in those chairs?

A. Yeah, I sat there by the white.

Q. And there were twelve of you sitting over there?

A. Twelve of us sitting over there.

Q. When did you leave from over there?

A. Well, after they got through picking the jury for the different cases that is when I got excused.

Q. They excused you?

A. Yes.

Q. That was on the occasion when they picked the petit jury?

A. That's right, petit jury.

Q. Now tell me this. When you came up here for the grand jury, that was six or seven years ago you said?

A. I think it was 6 or 7 years ago.

Q. In your best judgment you didn't come in this court room, did you?

A. I don't know if it was this courtroom or not, but I went some place, after they didn't use me, they told me I could go and get my money. I went in Mr. Woods office there and he paid me.

Q. Did you on that occasion did you see anybody picking any names from a hat?

A. No, I did not.

Q. But you know somebody told you—you don't remember seeing anybody picking any names from a hat?

A. No.

Q. But you know that eventually somebody told you that they couldn't use you?

A. Yeah.

Q. You went by the clerk's office and got your pay?

A. Yes, sir, got my pay.

Q. That is your best recollection?

A. That's my best recollection.

Q. You are not sure which room it was?

A. No. For that has been a good while ago.

Q. But you have no recollection of anyone picking any names from a hat?

A. No.

Q. That is all.

[fol. 133] Q. You told your lawyers these juries were selected by pulling names from a hat that morning when you were put in the box over here, is that what you are telling the court now, that these juries were picked by pulling them out of a hat?

I am not trying to mess you up now. I just want you to testify to what you remember. That is all.

A. I remember sitting over there in that box.

Q. What did you tell me about Mr. Arthur Wood calling the names out, do you remember that?

A. No, I don't remember.

Q. Didn't you name Mr. Wood a few minutes ago yourself?

A. Mr. Woods was the man that paid me off.

Q. Didn't you say that he called your name out and you stood up?

A. Yeah, I stood up back there.

Q. All right, was that for the petit jury or for the grand jury?

A. Petit jury.

Q. Who called your name out the morning you came up here for the grand jury?

A. I guess Mr. Woods.

Q. We don't want any guessing. Who called your name out the morning you were asked to come up here, by subpoena, to serve on a grand jury. Who called your name out that morning?

A. I don't know just who called it out that morning.

Q. Was your name called out?

A. Yeah, it was called out and I stood up back there.

Q. You were in this courtroom?

Mr. Hall: We object to him arguing with the witness.

Q. I am not arguing with him. He testified to it on cross examination and the lawyer took him back on redirect and he withdrew it and testified to something else. It is all in the record.

Do you remember standing up back there when you answered the grand jury call, and the man calling your name?

A. Yeah, I remember standing up. I stood up there on the petit jury, when I was here on the petit jury.

Q. I am talking about the grand jury. We have the petit jury business. I have no quarrel with that. We are now talking about the grand jury business.

You were sitting back in this courtroom?

[fol. 134] A. I think this courtroom.

Q. That's your best judgment?

A. Yeah.

Q. Is that the morning when you saw the judge pull the names out of the hat?

A. I don't know about pulling them out the hat now.

Q. Did you see him pick them out of the hat, or how was that grand jury chosen?

Was I the solicitor at that time?

Mr. Hall: If your Honor please, this witness has testified that he hasn't seen grand juries selected from what I understand from his testimony.

A. No, I never seen one selected.

Mr. Hollingsworth: If it please the Court he has testified he was in this courtroom whenever the roll was called.

Q. What year was this?

A. That was since I was on petit jury.

Q. Well, what year was it?

A. I couldn't tell what year it was.

Q. How many years ago has it been?

A. That has been six or seven years ago since I was here on the grand jury, but this petit jury.

Q. I am talking about the grand jury?

A. That's right, that has been six or seven years ago.

Q. Was it about 1955?

A. It may have been.

Q. Who was circuit judge at that time, Judge Teel or Judge Sullivan?

A. I don't know whether Judge Sullivan was judge or not.

Q. You don't remember who was circuit judge at that time?

A. No. It was Judge Teel or Judge Sullivan one, was judge?

Q. Were there any other lawyers in the courtroom other than myself?

A. Oh yes, it was several of them here.

Q. Several of them were here for the grand jury?

A. I don't know about that.

Q. That was when they was picking the grand jury, wasn't it?

A. They was in and out.

Q. You didn't see the judge draw any names out of a hat that morning?

A. I probably saw the judge draw them out. I hadn't ever seen a grand jury drawed.

[fol. 135] Q. You were there that morning weren't you?

A. Yeah, I was there that morning, but I didn't know what he had in the hat.

Q. Did he draw cards out of a hat?

A. He had them cards, but I stood up to my subpoena.

Q. Were you here when the grand jury was called and put in this box over here?

A. No. I left.

Q. You don't tell the court that were excused before the grand jury was empaneled?

A. Well the grand jury was empaneled and then they told me I could go home.

Q. Where was the grand jury empaneled. Were they put in these seats over here?

A. I don't know just now where they was put.

Q. You don't remember?

A. I don't remember.

Q. But you did stay in the courtroom until after the grand jury was empaneled?

A. I don't know whether they was through.

Q. Do you know what I mean by empaneled. That is putting them in the box and swearing them in. Making them raise their right hand.

A. You see, I didn't know about how they get them in.

Q. I am talking about, were you here when they stood up and raised their right hand and the judge swore them in?

A. It has been sq long now I wouldn't say for sure that they raised it or what. It has been six or seven years ago when I was here on grand jury.

Q. Do you remember being put in this box before you left?

A. I remember them putting them in the box when I was on petit jury.

Q. But do you remember being put in the box when you were up here for grand jury?

A. No, I don't.

Q. Is that when you came up for the grand jury? In 1958? (indicating book)

A. Yeah.

Q. That morning you asked for an excuse didn't you?

A. Why, no, I didn't ask for an excuse.

Mr. Hollingsworth: We would like for the record to show you Honor this record coming out of the jury roll for Talladega County that Ben L. Reynolds, Farmer, Childersburg, 9/22/58 was excused.

Mr. Billingsley: We object to him showing anything, the proper foundation hasn't been laid.

Mr. Hall: Your Honor please. We object to the record [fol. 136] showing that Ben L. Reynolds was excused. There is a symbol here which has "EX" by it. We don't know whether that would mean executed or what. I don't know what that means.

Mr. Hollingsworth: May it please the Court, just let the record show "Ex. 9/22/58." I want the right to call Mrs. Young anyway about some other things.

Mr. Hail: We would further like the record to show your Honor in objection that it does not indicate that this witness asked to be Ex'd. It just says Ex, we don't know whether it was by the court on its own motion or what.

Q. That is all for this witness.

(Witness excused.)

SAM ALLEN: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, address and occupation?

A. Sam Allen, 700 Howard Street.

Q. That is in Talladega County?

A. That's right.

Q. How long have you lived here?

A. I have lived in Talladega County for about 35 years.

Q. How old are you?

A. Fifty.

Q. Are you a negro?

A. That's right.

Q. Do you own any real estate?

A. Well, I would say yeah, me and my brother, which my brother is dead and so I'll say I own it myself.

Q. You and your brothers own some real estate?

A. You see, he passed and so I say I own it.

Q. You have some interest in some real estate?

A. Yeah.

Q. You may own the whole fee or you just may own part, but you do own some interest in real estate? In this county?

A. That's right.

Q. Do you have an automobile?

A. That's right. I own that myself.

Q. Is it worth \$300.00?

[fol. 137] A. Well, I wouldn't take Three Hundred for it.

Q. Do you own other personal property, furniture, clothes and that sort of thing?

A. That's right.

Q. Can you read and write?

A. Not very much.

Q. But can you read and write at all?

A. I can write my name.

Q. But you do not read ordinarily?

A. Well, I reads a little bit. Not too much.

Q. Have you ever served as a juror in this county?

A. No, I haven't ever served.

Q. Do you know of any negro who has served on the jury in this county at any time?

A. No, I couldn't say for sure right now at the present.

Q. Do you know of any negro at all who has served as a juror at all in this county?

A. No, I couldn't call it if I did, right now.

Q. Do you live in the city of Talladega?

A. That's right.

Q. The downtown area?

A. That's right.

Q. Do you live in a negro neighborhood, do negroes live around where you live?

A. No, it is not all negro. It is white people too. It is more white people than it is colored.

Q. And you have lived there a long time?

A. Yeah, I have stayed there for about 20 years I would say.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. You don't know how many negroes have served on grand juries in the past eight or nine years, do you, Sam?

A. No, sir.

Q. In other words, have you ever been up here when any grand juries have been empaneled?

A. No, sir.

Q. That is all.

(Witness excused.)

[fol. 138] THEODIS PATTERSON: Having been by the court duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q: State your name and address and occupation?

A. Theodis Patterson, 924 W. Battle Street, Barber and run a Florist.

Q. Are you a negro?

A. Yes, I am.

Q. Are you a native of this county?

A: I beg your pardon?

Q. Are you a native of Talladega County?

A. That's true.

Q. Have you lived here continuously all your life?

A. About 26 or 27 years.

Q. How old are you now?

A. Fifty.

Q. Do you own any real estate?

A. Yes, I do.

Q. Do you read and write the English language?

A. Yes, I do.

Q. Have you ever been convicted of any infamous crimes?

A. I have not.

Q. Have you been arrested or convicted for any crime at all?

A. Never have.

Q. Have you ever served on a jury in this county?

A. No, I have not.

Q. You have been called for jury service have you not?

A. I have been called.

Q. Do you recall when that was?

A. It has been, I would say about ten or eleven years ago. In this A. C. Garrett case.

Q. I didn't get that?

A. It was A. C. Garrett. I disremember what year it was. It might have been '53 or '54.

Q. In your best judgment was it around '53 or '54?

A. Yeah.

Q. Did you present yourself in answer to that subpoena?

[fol. 139] A. Yeah, I did.

Q. Did you request an excuse?

A. No, I didn't.

Q. How long did you attend court?

A. Two days.

Q. How many other persons were here, white and colored?

A. Well, at that time I think it was around about 75 or 80 I think.

Q. That is your best judgment?

A. Yes.

Q. Do you have a judgment as to how many negroes or do you know how many of that number were negroes?

A. That is what I was referring to that was subpoenaed at that time.

Q. That there were 75 or 80 negroes?

A. Negroes.

Q. Who came in answer to subpoena to serve on the jury?

A. That's true.

Q. How many—it is possible you are confusing witnesses and jurors, that is 75 or 80 negroes in the room or probably—

A. Oh, for witnesses.

Q. Both witnesses and jurors.

I'll invite you to reconsider and give us in your best judgment, if you know, the number of negroes or the number of people, white and colored, who were subpoenaed to serve as jurors on this occasion?

A. I don't know of any whites.

Q. There were no white persons on the jury?

A. Not as I know of. I wasn't here. I was excused before they even selected the jury.

Q. You say you were excused before the jury was struck?

A. That's true.

Q. Were you excused at your own request?

A. No, I wasn't.

Q. This is what I want to understand. How were you excused? When you first came up here with your subpoena on this occasion, what did you do?

A. They called me up and questioned me and after I was questioned I think, after they questioned so many of them, they told me I could be excused, to go by the clerk's [fol. 140] office and get the money.

Q. Did they question any white people?

A. I don't much think they did. They kept us back there in a room back yonder. They was calling one by one out. In fact of the business, one couldn't hear what the other one was going to say.

Q. Perhaps we are getting confused. Were you subpoenaed as a witness or as a juror?

A. As a witness I guess.

Q. As a witness and not a juror?

A. That's right.

Q. What we are interested in now is whether you have ever been subpoenaed to come up to this courtroom, or any court in this county, to serve as a juror?

A. No, I wasn't.

Q. You never have.

A. I never have.

Q. In all your life here in Talladega County?

A. That's true.

Q. Do you know of any other negroes who have been subpoenaed to serve or who have served as jurors?

A. Well, no I don't. No more than what I have heard. I never have known a negro to serve on a jury no more than what I have heard. That is Mr. Doug Jenkins. I have heard that he once have served on one. But me knowing, I don't know.

Q. No, we don't want you to answer in that way. We want to know if you know?

A. No, I don't.

Q. You do not know of a negro who has served in this county?

A. No, I do not.

Q. And you have lived here continuously for the last 26 or 27 years?

A. That's right.

Q. You live within the City of Talladega?

A. That's true.

Q. This is the county seat for Talladega County?

A. That's true.

Q. That is all.

[fol. 141] Cross-examination.

Mr. Hollingsworth:

Q. Do you know Sam P. Chatman?

A. That's true.

Q. Do you know whether or not he served on the grand jury that indicted the defendant in this case?

A. No, I don't.

Q. Do you know John Rhoden, Route 1, Childersburg, Box 96?

A. No, I don't.

Q. Is your name Theodis Patterson?

A. Correct.

Q. Do you live at 924 W. Battle Street, Talladega, Alabama?

A. Yes.

Mr. Hollingsworth: We would like the record to show, your Honor, the jury roll of Talladega County, for Beat Five, Talladega County, 1961, shows that Theodis Patterson of 924 W. Battle Street, Talladega, is on the roll. And it shows it as typed.

Q. You have never been present when a grand jury was empaneled, have you?

A. No, sir, I haven't.

Q: Do you recall that case you were up here as a witness on, that Arthur Shores, a colored attorney from Birmingham, Alabama, wasn't he representing A. C. Garrett?

A. That is true.

Q. That is all.

Redirect examination.

Mr. Hall:

Q. After you were excused as a witness, you didn't attend that Garrett hearing did you?

A. No, I didn't. I went back to work.

Q. Did you know your name was on the jury list of this county, on the present jury roll?

A. No.

Q. Have you been consulted by anyone on the jury commission?

A. Never have.

Q. Did any one of them tell you that you were on the jury roll?

A. No.

Q. Did any one of them interview you?

A. No.

[fol. 142] Q. So far as you knew you were not on the jury roll?

A. So far as I know.

Q. You do know you have never served as a juror?

A. That's true.

Q. And you do know that you don't know any other negro who has served?

A. No, I don't.

Q. That's all.

(Witness excused.)

FRANK CUNNINGHAM: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, address and occupation, please.

A. Reverend Frank Cunningham, employee at Anniston Ordnance Depot, stay at Route One, Box 167, Talladega, Alabama.

Q. Do you work full time?

A. Yes.

Q. You do live in Talladega County?

A. That's right, all my life.

Q. How old are you?

A. 47.

Q. Are you colored?

A. Yes.

Q. Do you own any real estate?

A. Yes.

Q. Do you read and write the English language?

A. Yes.

Q. Have you been convicted of any infamous crimes or any felony?

A. I paid fines, arrested for driving, speeding and arrested once for, they said reckless driving, about ten miles an hour.

Q. All your arrests have had to do with driving an automobile?

A. That's right.

Q. You have been arrested by city police?

A. Yes.

Q. Tried in the city court?

A. Yes, sir.

[fol. 143] Q. You have never been accused of any other crime?

A. Well, I have been accused but not found guilty.

Q. Have you ever been convicted for any serious crimes?

A. None.

Q. Have you ever served as a juror in this court in this county?

A. No, sir.

Q. Have you ever been called to serve as a juror?

A. No.

Q. That is all. Do you know of any negro who has been called or who has served as a juror in this county?

A. No, sir.

Q. That is all.

Cross-examination.

Mr. Love:

Q. Which church do you serve?

A. St. Mary at Lincoln and Lilly Hill at Talladega.

Q. Do you live in Talladega?

A. No, sir, I stay in the country.

Q. What beat do you live in?

A. I believe it is Beat 17.

Q. You have lived in Beat 17 all your life?

A. Well, yes, sir.

Q. You told the judge a few moments ago that you had been accused of some other crime but not convicted. Would you mind telling him what crime that was you were accused of?

A. I was accused—well, I wouldn't know what you call it, but my son in law and I got into it one time and he had a warrant sworn out for me and had me arrested and I wasn't found guilty of doing what he say, I guess it was.

Q. What did he say you did to him?

A. He said I wanted to cut his throat.

Q. There was a warrant taken out for you in Talladega County charging you with assault with intent to murder, wasn't there?

A. I think it was assault. I think that is what it was.

Q. Your son in law was cut, wasn't he?

A. No, he wasn't even scratched. I didn't even have a knife.

Q. But you went to trial and the judge turned you loose?
[fol. 144] A. Yes.

Q. Do you remember who defended you?

A. We didn't have a lawyer. It was in the city court.

Q. Are you a married man?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. Have you been arrested in the last ten years through any warrants sworn out by your wife?

A. No, sir.

Q. She never has charged you at any time with any assault and battery on her person?

A. No, sir.

Q. Has there been any other warrants taken out for your arrest where you were convicted or otherwise, for any crimes purportedly committed, by anybody in the State of Alabama?

A. Not that I know of. Let me see, that I know of.

Q. You never have been put in jail for anything else other what you referred to?

A. Yes, I have been arrested once by my mother-in-law.

Q. All right, that is the one I am asking about. Would you mind telling us what that was for?

A. It was for sassing her.

Q. Was that for sassing her or for whipping your wife or purportedly whipping your wife?

A. No, no, not for whipping my wife.

Q. What jail did she lodge you in for purportedly sassing her?

A. Talladega County jail.

Q. A warrant was taken out for you in this county, wasn't it?

A. That's right.

Q. Who was Sheriff at that time?

A. Gene Burt and Mr. Clinton Spencer I believe were. I believe Mr. Gene Burk was high sheriff.

Q. Did you pay any fine for sassing your mother in law?

A. Thirteen dollars.

Q. That is all.

[fol. 145] Redirect examination.

Mr. Hall:

Q. You paid a Thirteen fine for sassing your mother in law.

We'll ask you one more time. Have you ever been approached for service on a jury in Talledega County?

A. No, sir.

Q. You haven't been questioned by any member of the jury commission?

A. No, sir.

Q. You have never served?

A. No, sir.

Q. And you don't know any negro who has served as a juror?

A. No, sir.

Q. That is all.

(Witness excused).

ADOLPHUS COLEMAN: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name and address?

A. Adolphus Coleman, 832 West Battle Street.

Q. What's your occupation, Mr. Coleman?

A. My occupation was firing and operating the swimming pool, but I am not now.

Q. Are you a resident of Talladega County Alabama.

A. Yes.

Q. You are a negro are you not?

A. Yes.

Q. How long have you resided in this county?

A. All my life.

Q. How old are you now?

A. About 67.

Q. Are you a property owner?

A. I am.

Q. Do you read and write the English language?

A. Yes.

Q. Have you ever been convicted of any infamous crime?

A. No.

Q. Have you ever been subpoenaed to serve on a jury in this county?

[fol. 146] A. Yes.

Q. How often, how many times?

A. Twice.

Q. When was the last time?

A. Two years ago or a little over.

Q. Did you serve on that occasion?

A. No, I didn't.

Q. Did you answer the subpoena?

A. Yes.

Q. Did you ask for an excuse?

A. No.

Q. How many days did you attend court?

A. One.

Q. Why didn't you serve?

Mr. Hollingsworth: We object to that. That asks for a conclusion.

Q. We will ask him, if he knows, your Honor.

Mr. Hollingsworth: We still object to that because that is not within his discretion whether or not he serves. That is left up to the attorneys and to the parties trying the lawsuit.

Mr. Hall: If your Honor please, we don't agree with the Solicitor on that.

The Court: I'll let him answer, if he knows.

Q. Do you know why you didn't serve?

A. No.

Q. Were you—was your name called to serve. Were you placed on a jury?

A. No.

Q. How long during that one day that you attended the court, was it all day or just a short time?

A. We came in about 9:00 o'clock and got out of here around 10:00 or 10:30.

Q. Will you tell the court what happened after you came into court?

A. Well, court came to order and they called the roll—someone called the roll of the people who were subpoenaed and each person was supposed to answer to his name, and after his name was called the lawyers got together and picked out the jury and the rest of us was excused.

Q. Did they pick one jury. I'll withdraw that. Do you know how many people were present in answer to subpoena for jury service?

[fol. 147] A. No, I don't. It was quite a number but I don't know the number.

Q. Would you tell us in your best judgment how many was present?

A. 45 or 50.

Q. They were both white and colored persons. In your best judgment how many of this 45 or 50 were negroes?

A. Seven or eight.

Q. Were any of these seven or eight negroes selected to serve on the jury that was selected?

A. No.

Q. Do you know how many juries were selected, whether it was one or several?

A. I think it was three. It might have been more, but I wouldn't say.

Q. At least three juries of twelve men each. Were any negroes picked on any of that any of those three juries?

A. No.

Q. All negroes were excused?

A. And some whites too.

Q. Who told you you could go home?

A. The court told me.

Q. Was that your only experience in court answer to subpoena to serve as a juror?

A. I have been twice.

Q. What was the other time?

A. I was just asked to come—subpoenaed to come.

Q. When was that?

A. I don't know. That has been quite a little while ago. It was two or three years before the last time. The last time has been over two years.

Q. In your best judgment it was four or five years ago?

A. That's correct.

Q. Would you say it might have been in '57 or 1958?

A. It might have been '56 or it might have been '57.

Q. Will you tell us what happened on that occasion?

A. After they called the roll and we answered present, we stayed here until they was through electing a jury I guess. Anyway, they said you may go by the office and get your check.

Q. Now, tell us this, Mr. Coleman, if you know. How many juries were selected—first, how many persons, both white and colored, were present in answer to subpoena [fol. 148] to serve as jurors on that occasion?

A. I don't know.

Q. We are asking for your best judgment?

A. I guess my best judgment would be fifty or sixty, maybe.

Q. We will ask you, in your best judgment, how many of that number were colored?

A. I couldn't tell you because I don't know that. I know it was some of them but how many I don't know. I have no idea how many.

Q. Would you say there were as many as five?

A. I don't know.

Q. Do you recall how many juries were selected on that occasion before you left?

A. No, I don't recall.

Q. Were several juries selected?

A. I don't know because it has been a good while ago and I don't remember back that far as to what happened.

Q. Do you know that you were not selected to served?

A. I know that I wasn't..

Q. Have you ever served on a grand jury in this county?

A. No, I haven't.

Q. Do you know of any negro who has served on a petit or grand jury in Talladega County?

A. No, actually knowing, I don't.

Q. You don't know of any?

A. No.

Q. Do you live in the metropolitan area of Talladega, City of Talladega?

A. Yes, I do.

Q. You have lived here for the most of your life?

A. Yes.

Q. Are you well acquainted among negroes in Talladega, city and county?

A. Fairly I would say. I wouldn't say whether I was.

Q. Do you say that you know a considerable number of negroes in this county and in this city, is that true?

A. I don't hardly know how to answer that because I know some people and some I know by their names and some I know by face only.

Q. Do you belong to any fraternal organizations?

A. No.

Q. Are you affiliated with any religious institution?

[fol. 149] A. Church?

Q. Yes, temple, church, congregation?

A. Congregation church.

Q. What do you—do you go to the Congregational church?

A. Yeah—what do I do.

Q. I beg your pardon?

A. You say what do I do?

Q. No, no. I want to know if you belong to that church?

A. Yeah.

Q. Do you have any idea of its membership, how many members it has?

A. 75 or 80.

Q. You know these people fairly well?

A. Fairly well.

Q. Do they represent some of your more substantial negro citizens in this area?

A. Yes.

Q. Do you know whether any of them has ever served on juries?

A. Not to my knowing. I don't know really.

Q. Is that the only organization, social, religious that you belong to in this area? You are not a farmer are you?

A. Yes, part time.

Q. You do own some farming land?

A. Yes.

Q. Do you belong to any farm cooperative?

A. Farm Bureau.

Q. What is the nature of the Farm Bureau, tell us briefly about its makeup and purpose and membership?

A. I don't know too much about it. The only thing, I know they have an insurance, the farmers who are members take out insurance if they want it and the farmers

exchange down there and each year they give you a dividend on your trading and so forth.

Q. Is the farmers exchange a mercantile market or some place they sell merchandise?

A. Fertilizer and seed.

Q. Do they sell to members of the bureau and to anyone else?

A. So far as I know.

Q. Do they enroll members by race?

A. No, I guess not. I don't know.

[fol. 150] Q. On your membership application, do you have to designate your race?

A. No.

Q. Do you know many negroes who are members of the Farm Bureau?

A. No, I don't know but about five or six.

Q. Would you say that they have many negroes as members or a few?

A. They have a few, so far as I know of.

Q. Do you know any of your fellow farm bureau members who are colored who have served as jurors in this county?

A. No, I don't.

Q. Do you belong to any other cooperative, the R.E.A.?

A. No.

Q. Are you acquainted with any negroes who belong to the R.E.A.?

A. Not that I know of.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. In the vicinity where you live you are served by the Alabama Power Company?

A. Yes, that's right.

Q. That is all.

(Witness excused.)

ED CHAMBERS: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. Tell us your name, address and occupation?

A. My name is Ed Chambers, Route 5, Box 3, Talladega, Alabama.

Q. Is that on Battle Street?

A. On Battle Street.

Q. Do you live within the city limits of Talladega?

A. I am in the city limits.

Q. You are in Beat Five?

A. Beat Five.

Q. Mr. Chambers, what is your occupation?

A. I ain't got none. I ain't doing anything. I can't work.

Q. What did you do before you arrived at that?

A. Bemiston Bag Company.

Q. How long were you employed there?

[fol. 151] A. About thirteen years.

Q. Are you retired now?

A. I'm retired.

Q. How long have you lived in Talladega County?

A. All my life.

Q. How old are you now?

A. 68.

Q. You are a negro are you not?

A. I'm a straight "nigger."

Q. How long have you been retired?

A. About, between three and four years.

Q. You are 68 years old now.

Do you own any real estate?

A. I don't. My wife do.

Q. Do you read and write the English language?

A. A little.

Q. Have you ever been convicted of any infamous crime?

A. No.

Q. Have you ever served as a juror in this county?

A. No. No.

Q. Did you say no?

A. No.

Q. On no kind of jury?

A. No kind. I ain't.

Q. Do you know of any other negro who has served on a jury in this county?

A. No.

Q. Have you ever heard of an occasion of a negro serving in this county as a juror?

A. No.

Q. Are you saying no?

A. No.

Q. Although you are retired your health is good, is it not?

A. It is very good.

Q. For your age of course.

A. 68.

Q. You are able to get about?

[fol. 152] A. Yeah, I'm getting about.

Q. You are not confined to any bed?

A. No.

Q. No doctor has told you that you could not move about freely?

A. No.

Q. You have control of your mental processes?

A. Yeah.

Q. Do you know of any reason why you couldn't serve as a juror in this country?

A. No. I don't know.

Q. That is all.

Mr. Hollingsworth: No questions. Let the record show that Ed Chambers name is not on the record in this county.

(Witness excused.)

Clarence H. Burt: Having been duly sworn, testified as follows:

Direct examination.

Mr. Hall:

Q. State your name, occupation and address?

A. My name is Clarence H. Burt, and my occupation is a truck driver. I work for the Anniston-Talladega Motor

Express and my address is Route 4, Box 123, Talladega.

Q. How long have you lived in this county?

A. All my life.

Q. How old are you now?

A. 37.

Q. You are a negro are you not?

A. I am.

Q. Do you own any real estate in this county?

A. I do.

Q. Do you read and write the English language?

A. I do.

Q. Have you ever been convicted of any infamous crime?

A. I haven't.

Q. Have you ever served as a juror in this county?

A. No.

Q. Have you ever been called to serve as a juror in Talladega County?

A. No, I haven't

[fol. 153] Q. Do you know any negro who has served as a juror in this county?

A. No, if I have heard of one I don't know.

Q. Well, do you know of any negro who has been called to serve as a juror in this county?

A. No.

Q. Your address is evidently a rural route?

A. That's right.

Q. Where is that situated?

A. That is situated south of Talladega. It is called the Ashland Highway.

Q. What is the community called?

A. Lane Chappell community.

Q. Would you say that is between the City of Talladega and —

A. —and Ashland.

Q. I see. Are there many negroes in that area?

A. Not too many.

Q. When you say not too many, would you give us your best judgment as to how many in terms of hundreds?

A. I would say about three hundred or less.

Q. Are you pretty well acquainted with that three hundred negroes in your community?

A. Yes, I am.

Q. You have lived there all your life?

A. All my life, that's right.

Q. And you don't know of a single one of these negroes who have served on a jury in Talladega County, Alabama?

A. Well, I know the Jenkins and they say they have.

Q. You yourself don't know.

A. I don't know.

Q. Does this Jenkins live in your community?

A. Yes.

Q. You have heard that this Jenkins has served?

A. That's right.

Q. What beat is that, do you know?

A. I believe it is Beat Six.

Q. Do you vote in this county?

A. No, I don't.

[fol. 154] Q. You are not a registered voter?

A. No.

Q. How far do you live from Alpine?

A. About twelve miles I believe.

Q. You say the community where you live is between here and Ashland?

A. Yes.

Q. How many miles south of Talladega is that?

A. About five.

Q. Is that on the Skyline Highway section or which way is that?

A. That is on the Ashland Highway right that direction.

Q. That is what they call the Skyline, going through Ashland, isn't it?

A. The Skyline I think is going to Anniston which is east, of there.

Q. Going toward Ashland would be South or Southeast?

A. You might could say southeast. It is going out South Street from Talladega.

Q. You don't know the beat if it is not Beat Six?

A. I thought it was six, or eight.

Q. But you do not know of any negro among the approximately 300 negroes in your community who has served as a juror in this county?

A. No, I don't know.

Q. That is all.

Cross-examination.

Mr. Hollingsworth:

Q. When you are talking about three hundred you are talking about men, women and children, everybody, aren't you?

A. That's right.

Q. How many miles does that 300 cover?

A. I would say approximately about ten square miles.

Q. That is all.

Redirect examination.

Mr. Hall:

Q. How many of those 300 persons are adult males?

A. Oh, approximately about 50.

Q. Of that 50 adult males you don't know a single one who has ever served on a jury? In this county?

A. I don't know.

Q. Thank you. That's all.

Recross-examination.

Mr. Hollingsworth:

Q. I want to see how many you can call off.

[fol. 155] A. Do you want me to just start calling names.

Q. That's right of the ones that live in this area, if you know. I want the ones now between the ages of 21, over 21 years old, who are physically able and have good minds and who are not drunkards.

Mr. Hall: Your Honor, we object to that. It hasn't been shown that this witness knows those who are over 21 who are not drunkards and who otherwise might qualify, but he did testify as to adult males, those over 21, but he didn't say whether they were drunkards or not.

Q. How many out there do you know who are habitual drunkards, out of that number.

Mr. Hall: I object to that. It—I don't think this witness is qualified to testify as to who may or may not be a drunkard.

Mr. Hollingsworth: If he is qualified, your Honor, to give the estimate on the number of males out there over 21, it looks like he would know a drunkard when he saw one.

Mr. Hall: Your Honor, drunkard is a legal term.

Q. Do you have any drunkards in your community, either white or black?

A. I don't know too much about the white—I see a few walking up and down the road who would appear to be a drunkard. I don't drink and I don't know too much about that.

Q. What about the colored people? Do you know any of them that drink too much?

A. Well, I know a few that sells too much but they don't drink too much.

Q. How many people would you say—how many children would you say the family has out there?

A. That would be hard to say the average family.

Q. The reason I am asking you that. You took the figure 300 and then you took the figure 50 males?

A. Well, the most of the families out there are rather small, I mean they don't have too many children. There is a few families that have lots of children.

Q. Are there any out there that you know of that have as many as ten or 12 children?

A. It is.

Q. How many would you say, you personally, you estimated fifty. You don't know all fifty by names do you?

A. I probably do.

Q. Let's name some and see how many we can get?

A. Moot Jenkins.

Q. As a matter of fact, he is the man about 60 or 65 years old, isn't he?

[fol. 156] A. I wouldn't know. I believe he's above 60.

Q. He has served on the grand jury down here, hasn't he?

A. I don't know. I haven't been in the jury before. But I know his brother said he did once, but I hadn't ever heard him say he did.

Q. Both he and his brother are colored men of good character, isn't that right?

A. That's right.

Q. They are held in high esteem in their community?

A. That's right.

Q. You know the two Jenkenses, and who else?

A. Andrew Cochran.

Q. He is seated back here, isn't he?

A. He was yesterday.

Q. He has raised a big family of children, hasn't he.

Did you know him at the time he lived in Knoxville when he was married to Matilda Cunningham's daughter?

A. I didn't ---- him until he moved out in our community.

Q. Andrew Cochran, he is a good fellow, isn't he?

A. So far as I know.

Q. Do you know Walter Cochran, his son, seated on the front row?

A. Yes, I know him. I went to school with him.

Q. Do you know Cecil?

A. I know Cecil.

Q. Walter is a fellow of good reputation?

A. Yes, sir, so far as I know.

Q. As a matter of fact, Walter has been called for jury service some two or three times, hasn't he?

A. He didn't say anything about it to me if he did, I don't know.

Q. Let's see if Walter Cochran is on the roll. Where does Walter work, at Newbury?

A. I don't think he works there now. I believe he works at Childersburg now.

Q. Who else do you know out there?

A. I know John L. Williams.

Q. What age man is he?

A. He went to school with me, about my age.

Q. Where does he work?

A. Beniston.

Q. Is he married or single?

[fol. 157] A. He is married.

Q. Who else?

A. Julius Williams.

Q. Are they brothers?

A. They are brothers.

Q. Do you know whether or not John Williams or Julius Williams names are on the jury roll?

A. I don't know.

Q. Do you which beat they live in?

A. They live in the some one I do. We are close neighbors.

Q. Name me some more names?

A. Henry Whitson.

Q. All these people, are they property owners?

A. I know—yes, they are property owners even if their parents own places.

Q. In other words, they are living with their parents, some of them?

A. They don't live with their parents, but their parents, some of them live on the homestead.

Q. They are heirs to property?

A. Yes. J. L. bought his place and I know Henry Whitson bought a place here lately.

Q. Can all of them read and write to your knowledge?

A. They all can.

Q. Go ahead and name some more.

A. James Cameron.

Q. Do you know whether or not he is on?

A. No, I don't.

Q. Do you have any more?

A. Stevens, Willie Ray.

Q. Is he a married man?

A. Married.

Q. Who else now?

A. Willie Fluker.

Q. Willie has been in court some?

A. You mean on jury or something like that.

Q. No. Has he ever been in trouble that you know of?

A. The one I'm thinking of haven't. We call him Butch Fluker.

[fol. 158] Q. That is nine.

A. I can name some more. McGhee, Henry Lee McGhee.

Q. Is that the son of Watt McGhee. Who is his daddy?

A. He is that McGhee family that lives out Taylor's Mill. I don't know his daddy.;

Q. Is that the crowd that out from the Brecon area when it was converted before the War?

A. I don't remember that far back. They always lived down about Taylor's Mill though.

Q. Do you have any other names?

A. Well, Frank McNeil.

Q. Any others?

A. I can't hardly call them by name. They are scattered around in the community there.

Q. That is all.

(Witness excused.)

Mr. Hall: That is our case, your Honor. We rest.

Mr. Hollingsworth: We would like to call Mrs. Elizabeth Young back to the stand.

Mr. Hall: Before we go into the State's case we would like to make a motion and have a ruling on our motion. I think we have more than proved our case.

Mr. Hollingsworth: May it please the Court we would like the right to cross-examine Mrs. Young. She was called by the movants and we haven't finised our cross examination.

Mr. Hall: In that event we will withdraw our motion. But, we do object to her being further cross examined. They have a right to put her on as their own witness. We have not put her back on the stand on any redirect and they have no right to recross her. This is subjecting the defendant the *the* movant here to an undue situation, requiring us to take the consequences whatever the witness may say.

Mr. Hollingsworth: May it please the Court, it was brought out by the counsel that Ben Reynolds, witness for the defendant, that in front of his name he had the letters "Ex" and the State made some remark about it being "excused" and it was stipulated in the record. I have a right to call her, she is the one that made the entry in that record. I submit, your Honor, I have the right to call her and ask her what "Ex" stands for, if she knows.

Also on remarks on the jury roll brought out by counsel for the movant. I have never seen a case in my life where the parties didn't have the right to call the witness back for further cross examination on either side.

[fol. 159] The Court: I'll overrule the objection.

Mr. Hall: Your Honor, please, we want an exception. We have rested our case. This witness has been crossed once and we don't want to be put in the position of taking issue with the Court. But certainly they have all rights in the world to call any witness they want and to show any-

thing they want to show. These are their records, these are the State records. And State employee. We certainly want an exception.

The Court: You have one.

Mrs. ELIZABETH YOUNG: Having previously been sworn, testified further as follows:

Recross-examination.

Mr. Hollingsworth:

Q. Mrs. Young, I'll show you the jury roll for Talladega County—I'll withdraw that.

Mr. Hollingsworth: May it please the court, we would like to introduce the minute entry of April, 1961, for October, 1961, as on record in the jury book of Talladega County, into evidence. We submit in view of the evidence, we believe we have the right to offer the entry of October, 1961, as it has a bearing on the jury box, roll. I'll just read it into the record. We offer this minute entry here of October, 1961, and we would like leave of the Court to submit a copy of the same for the record. And if the attorney here wants to offer any part of this from 1959 on, we have no objection. He can offer it all.

Mr. Hall: We would like to be heard on this offer. We have no objection if he wants to offer the whole book. We submit that no portion of the jury list for the current term should be offered separately. It is one bound volume and if you take any portion of it out of context, it is not a true reflection of the activities of this jury commission. If you are going to offer any part of these minutes, you ought to offer all of them, the entire list for the current term.

Q. We will withdraw our offer.

Mrs. Young, I'll show you this jury roll for Talladega County and ask you, can you explain to the Court why some of these names are put on with the typewriter, others put on in ink or either pencil?

A. Yes.

Q. Would you take it and thumb through it and tell us why, if you know?

A. Well, just take the, any of them, Alfred Cabana.

Q. First, do you know Alfred Cabana?

A. I certainly do.

Q. Is he a white man or a negro?

A. He is a white man, manager of Bachman-Uxbridge. [fol. 160] When we refill this box, we had some cards that were left in the box that had not been used. The law says to leave out the ones that have been used for the past two years, so the ones that were left in the box, on some of the roll, instead of going back and having to retype the whole roll we went back and wrote the names in. For instance, we will just — Alfred Cabana as an example and go back to the inactive roll which was the roll previous to this. Alfred O. Cabana was not drawn, you see.

Q. In other words, he never served in this particular box?

A. He didn't serve back in this two year period, so we brought his name forward. However, maybe if he was excused and didn't serve in this period, we brought his name forward. That accounts for—let's take another one. Walter Cochran. I believe you called his name while ago.

Q. That is right. I believe he is a negro, is he not?

A. Yes. Well, I don't know. I heard his name called.

Q. In other words, the testimony—

A. —Avenue H, yes.

Q. Well, let the record show that he is.

A. Personally, I don't know. Anyway, his name was excused. I showed it to Mr. Billingsley a few minutes ago. He was excused. I can't see that right now, where he was excused.

Q. Just take your time and find it, please maam. Was that on 12-14-59?

A. Right.

Q. Therefore, you put his name on the other roll?

A. That's right.

Q. Was this typewritten roll prepared before the jury box was filled?

A. Yes.

Q. Then after the box was filled these cards, like Walter Cochran were put back in written in?

A. Well, when we started to fill the box you know, I do

not have access to the box only through the jury commission and when they open the box and refill it we took the names out and they re-worked the names and I penned some of them, and penciled some of them. In fact, I typed some of the names in, and it was taking too long, so then I penned some of them in. Here is another case. Charles B. Dison is penciled in.

Q. Is he white or colored?

A. I don't know. Isbell Circle. I think he is white. Let me see. (indicating) There it is, it wasn't drawn, see.

Q. Yes, maam. Now let me ask you this. Ben Reynolds [fol. 161] of Childersburg, do you know which beat Childersburg is in?

A. Beat Twelve.

Q. Is Ben L. Reynolds, Sr's name on this particular list?

A. This list here?

Q. It was on one of the lists that we found it. I don't know whether it was the old list or the new list. Now would you check this list or the other list and see whether or not his name appears on it.

The one prior to that. I want to get to the inactive list. That is what I am trying to get at. What does that "Ex" stand for, if you know, before these dates, it says here 9/22/58?

A. "Ex" is my abbreviation for excused. If it is exempt, I write out exempt. For instance, there is Exempt right there.

Q. And then "N.F." is not found?

A. "N.F." is not found. "N.A." is no answer.

Q. That is all.

Redirect examination:

Mr. Hall:

Q. What does that excused mean?

A. That means that the person is excused by the Judge. He wouldn't have to answer. When he asks to be excused if he is excused, he is excused by the Judge.

Q. That means he is excused at his own request?

A. Right.

Q. Not that he was stricken?

A. No.

Q. That he requested to be excused?

A. That's right.

Q. In all cases where you have "Ex" in the book?

A. Yes.

Q. Does it show here where a negro has been called and not asked for an excuse but had not been used, if he appeared?

A. No, where he were called and not asked for an excuse it would show that he was empaneled.

Q. It doesn't show anything other than that?

A. No.

Q. But where you have "Ex" it indicates that the man himself asked to be excused?

A. Yes.

[fol. 162] Q. On these exemptions, are they exempt automatically or when they claim their exemptions?

A. When they claim them.

Q. Is there any indication at all on this list, Mrs. Young, as to who is white or who is colored?

A. No. None whatsoever.

Q. Is it possible that some of the persons on the current list also served on the inactive list and were not excused?

A. There is a possibility that we have a duplicate, but not probable. We tried to scale it down to where we wouldn't have any duplications, but there is a possibility—the way we usually get a duplicate is by different beats, maybe the beats connect, or something like that. There is a possibility there could be a duplicate but not intentional.

Q. So far as you know, there is no indication on this list at-all as to who is white and who is colored?

A. Oh, no, none whatsoever. There is no identification.

Q. In the process of refilling the box every two years, Mrs. Young, what do you do first, make the roll or refill the box?

A. Now, I don't understand your question.

Q. What I am trying to get at. The filling of the box simply means that names, addresses and occupations are written on cards and whatever information you have?

A. That's correct.

Q. And put into the box, I assume?

A. Yes.

Q. Which is done first. Do you make the cards when you

—do you take the roll from the cards or the cards from the roll?

A. Usually—it is easier for me to do. I take the list that is presented to me from the jury commission. I make my cards from the list that is given to me. I set my cards up alphabetically then, and then I type my roll from the cards that I have made from the list that the jury commission presents to me. In order that I might be able to set it up properly, alphabetically.

Q. Then you make the roll from the cards?

A. Right.

Q. In this instance you make your last list, you have already made up your roll from cards left over, from the previous filling of the box is that right?

A. Well—

[fol. 163] Q. Or you had already made your roll from the list given to you by the commission?

A. I made my roll from the list given to me by the commissioners. You see, in setting up your cards, when you say you have 2000 or 2500 cards to set up alphabetically, it is easier to take the list that is presented to you by the commission, type up your cards, then check them back on the list, this is my procedure, then take my roll and type my roll from the cards and then recheck the cards with the roll to be sure.

Q. In this instance the list having already been made when the cards were finally checked. The names that were left over you just wrote in in pencil?

A. No. I started typing the names in on some of the beats. I saw how long it was going to take me because we were trying to get all this done in one day, and I saw how long it was going to take me, so before I got through typing I just started with pencil—well; any names you see written in were names that were carried over from the last roll.

Q. You have gone through this list since that was pointed out. There are a considerable number of such names—

Mr. Hollingsworth: We are going to object to that remark by counsel, I believe we found three on a page that — 42 to 45 names yesterday. If he wants to make an accurate account for the record, we have no objection. But

we do object to using the word considerable, because that is a conclusion and you could translate the meaning much larger than what it actually represents in the book. There are many pages where there have been no additions to it whatsoever.

The Court: I'll sustain.

Q. If your Honor please, we will withdraw that remark and begs your Honor's indulgence, we didn't want to have to go through the book and count such notations. Mrs. Young, would you please check this book for the current list and tell us how many of these are inked in or penciled. As a matter of fact, we would like to know how many are penciled and how many are inked. You may do that later, there is one other question we would like to ask at this time. We notice on this particular page and we direct your attention to it, in the list of jurors for Talladega County for this current term, Beat Five, Talladega, October, 1961, certain names, for instance Cochran, Matt, Curry, Frank, Curry, George, have certain little marks behind them penciled in. We would just like to know what those marks are for.

A. I couldn't tell you because I didn't pencil those marks in there.

Q. If your Honor please, we would like the record to show that there are certain marks behind three names on the page which we referred to.

[fol. 164] Mr. Hollingsworth: Describe the marks.

Mr. Hall: It is the type marks that are usually used to indicate a check of some kind, a check mark.

Q. It has some connotation, doesn't it Mrs. Young. All the other writing on the page means something and we were wondering what those marks meant?

A. Well, I don't know.

Q. Do you know whether those persons are colored or white, or what?

A. No, I don't.

Q. Could you look at that?

A. I know Frank Curry.

Q. Is he white or colored?

A. Yes, I know Frank Curry. He is a colored man. I don't know George Curry.

Q. Do you know Mack Cochran?

A. No, I don't.

Q. One of them is colored. Could that mark means that all three of those men are colored?

A. I don't know.

Mr. Hollingsworth: We are going to object to that.

The Court: I'll sustain.

Q. Could you please tell us how many of these names are penciled in on the list for this year and how many are inked in. You can tell us later when you count them. That is all for this time.

Mr. Hollingsworth: May it please the Court, we would like the record to show that this book has been on the counsel table and all four of the attorneys have had access to it.

(A discussion was had among the attorneys present, out of the hearing of the court reporter)

Mr. Hollingsworth: Your Honor unless the counsel will stipulate that Mr. Love put those marks on there yesterday in the presence of Attorney Billingsley, we will put Mr. Love on the stand to show that.

The Court: Unless counsel so stipulate I think that should be done.

(Witness excused.)

[fol. 165]. Mr. Love: Recalled to the witness stand, having been previously sworn, testified as follows:

Recross-examination.

Mr. Hollingsworth:

Q. This is Mr. Love who testified in this case yesterday?

A. That is right, and I did.

Q. Mr. Love, I believe the record will indicate that counsel for the movant questioned Mrs. Young concerning some check marks by the names of three individuals as reflected in this jury roll book, more specifically by the names of Mack Coehran, Frank Curry and George Curry, as shown on the roll of Beat Five, Talladega, October,

1961 and I'll ask you whether or not you did that in open court?

A. I did yesterday morning prior to Hall arriving.

Q. At that time did Orzell Billingsley, Jr., the attorney for the Movant, did he at that time have a list of prospective witnesses in court?

A. He did.

Q. Did you have an opportunity to observe the witness list?

A. Yes, he furnished me with a witness list and we were sitting there talking yesterday while he was putting on his case about whether or not any of those peoples names were on this jury list. While he was putting his case on and asking various and sundry questions of attorney witnesses, I was checking the list off against his typewritten list of the witnesses that he was calling there just across the table from him, and as I would find one from his list I was checking. I checked Mack Cochran. I checked Frank Curry. I checked George Curry.

Q. Did you check some additional ones, other than those three?

A. I made some additional marks of some others, but if I am not mistaken, along about that time I put them on your yellow pad because I would write the check by them and put yes and what date they served. I don't remember whether I put any more in the book or not. But the others I believe I have transferred over—I believe it was your yellow pad so we would know which ones of those witnesses that took the stand, that their name as in the jury box this time. That was the purpose of it.

Q. That is all.

Redirect examination.

Mr. Hall:

Q. Mr. Love, about how many of those check marks did you make? Do you know?

A. Peter, I see three there but I believe if you will get Mr. Hollingsworth's list there, about that time I started transferring them to a yellow piece of paper. I believe, Mr. Hollingsworth, you have one there that has the witness [fol. 166] list on it. I put some checks by the others that

had served. I put some markings on the side there as to when they served and whether or not their names were on this present jury roll. I did that for information of both Orzell and myself.

Q. That is all.

Recross-examination.

Mr. Hollingsworth:

Q. Incidentally, I'll show you this list here, it has Frank Curry, George Curry and Matt Cochran?

A. That's right. On page 4 I have there. (indicating)

Q. The same three identical names that are checked there did you write that?

A. That's right. On page 4, that would be page 4, Beat Five.

Q. That is your handwriting?

A. That's my handwriting. Now in the minute book, if you will turn to Beat Five on Page 4 you will find those names that have been checked off.

Q. That is all.

Mr. Hall: We don't have any further questions.

(Witness excused.)

The Court: Court will be at recess for noon, until 1:00 o'clock.

(At 1:00 o'clock, p.m. court reconvened, with counsel as before, in the presence of the defendant.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Do I understand the Movant has rested.

Mr. Hall: Our case is in. We rest with what we have.

Mr. Hollingsworth: First, we laid the predicate for this yesterday. It has been marked State's Exhibit No. 1, the grand jury report as State's Exhibit No. 1.

Mr. Hall: We object to that, the offer into evidence of a page from a book, which has no probative value at all. It is not the original document at all and it does not prove anything.

Mr. Hollingsworth: We submit it is the minute entry,

that it is the final record of the circuit court. We submit the predicate was laid yesterday when, I believe it was Mrs. Young and I believe Mr. Wood was on the stand, I know that the predicate was laid.

Mr. Billingsley: If your Honor please, our objection to the introduction of that paper or that page from a book on yesterday, was the ground that no proper predicate had been laid, and Mr. Hollingsworth decided to hold that exhibit until later. It hasn't been proven that that document [fol. 167] is what it purports to be. It is obvious that sufficient predicate hasn't been laid for the offer into evidence. We don't know who wrote it or the man who signed the document. It just is not admissible.

The Court: Do you object to the original being offered.

Mr. Billingsley: I object to that. I will object to the original when it is presented.

Mr. Hollingsworth: May it please the Court, let me say this. Mrs. Young testified yesterday that they had the original on file in that office, and that she had read the original, and checked it with this particular copy, that it was a true and exact copy, that this book is kept in the Circuit clerk's office and that Mr. Wood has been the Circuit Clerk for some sixteen years and that she has been a deputy clerk for some period of years, it is in the record, that she knows this to be accurate and true, that there are only two clerks in there that do the typing. Mr. Wood, she testified, did know typing, and that this is a true and exact copy of the report and that it was transcribed correctly, and that it had not been changed or tampered with and that it is now in the same or substantially the same condition as it was when it was put on record.

Now, that is the Minute Book, that is the highest and best evidence. That is the final record of the Circuit Clerk of Talladega County.

We submit, your Honor, that it is material, because in the allegations the petition or the motion to quash the indictment as filed by the movant in this particular cause, they aver that for the past ten years there have been no negroes on the grand jury, that they had been systematically excluded from the grand juries, that they had been intentionally incriminated or discriminated against. We submit to your Honor that that is in direct rebuttal to the

allegations alleged in the petition and would be admissible for the probative value and would tend to show that the officials of the board and the officials of this county go by the law. We haven't hid anything during the process of this particular hearing, everything has been out in the open and we submit we would like the appellate courts in the event this particular case goes up to have an opportunity to see has complied with the law.

We have no contention so far as the Alabama of any happenings or occurrences prior to that time, before that. It is not our contention that they served on only petit juries, but they definitely have served on nearly all of the grand juries since that particular time.

Mr. Billingsley: If your Honor please, our complaint [fol. 168] alleges that no negroes have ever served on a grand jury in Talladega County in modern times and that if any negroes have served, that it only constituted a token number of eligible negroes in the county. We have two further grounds; one that is not the best evidence and two, that it is irrelevant, incompetent and immaterial. If the State wants to show that this has happened, the State can do it by proper evidence. That self-serving document there does not prove that the jury commission of this county has complied with the law as relates to the service of negroes.

The Court: I'll sustain.

Mr. Hollingsworth: Your Honor, I would like to say—

The Court: I am sustaining on the ground that paragraph 13 contains a mixed conclusion of law and fact.

Mr. Hollingsworth: All right, sir. We call Miss Sophia Morris.

MISS SOPHIA MORRIS: Having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Hollingsworth:

Q. What is your name, please maam?

A. Sophia Morris.

Q. Where are you employed?

A. Talladega County Health Department.

Q. Where do you live, Miss Morris?

A. Winterboro.

Q. How long have you been employed by the Talladega County Health Department?

A. A little more than 31 years.

Q. What are your duties as an employee of the Talladega County Health Department?

A. I am a secretary.

Q. Are you the keeper of the official records of the Talladega Health Department?

A. Yes, I am.

Q. Do you keep true and accurate records in your department?

A. Yes.

Q. Pursuant to a subpoena, were you requested to bring certain records before the Circuit Court?

A. Yes.

Q. Do you have those records with you?

A. I have.

Q. Pursuant to that subpoena and a prior conversation with me, Miss Morris,—I'll withdraw that.

[fol. 169] Do those records accurately represent the matters contained therein?

A. Yes.

Q. Were they prepared by you?

A. Yes.

Q. Were they prepared by you throughout the year 1961 as certain events occurred or happened?

A. Yes.

Q. Are those records now in the same or substantially the same condition as they were at the time you prepared them?

A. Yes.

Q. Have they been in your possession as secretary or custodian of the records since the time you prepared them?

A. Yes.

Q. In your capacity at the Talladega County Health Department, do you keep up with the total number of children born in Talladega County for the year 1961, both white and negro?

A. I—

Mr. Hall: If your Honor please, we object to that, unless it can be shown that it is part of her official duty, that this is part of her job and that she is further qualified to do statistics. We would further like to examine her on the voir dire before she is allowed to answer any pertinent question.

Mr. Hollingsworth: May it please the Court, I'll ask her—

Are these reports kept as part of your duties with the Talladega County Health Department?

A. I have been appointed Registrar of Vital Statistics in Talladega County.

Q. How many years have you acted in that capacity?

A. Since 1945 I believe.

Mr. Hollingsworth: Your Honor, I believe that clears up one of the points that the attorney mentioned. Now, about the voir dire, what is the court's ruling on that?

The Court: In what respect do you want to examine on the voir dire.

Mr. Hall: Your Honor, I think Miss Morris stated to a question that she prepared the records she brought pursuant to a subpoena duces tecum. I would like to ascertain from what data or what information she prepared these records. Did she herself gather this data or was it supplied by persons who gathered it. I would also like to [fol. 170] know whether the records which she has are records of the Talladega County Health Department or the records of the Bureau of Vital Statistics for Talladega County, or if they are combined.

Mr. Hollingsworth:

Q. Are those the records of the Talladega County Health Department?

A. Yes, sir, they are.

Q. In connection with the Talladega County Health Department you are also keeping them for the Bureau of Vital Statistics, is that correct?

A. We gather the reports in this county.

Q. Prior to my coming to your office, these records had already been collected, had it not, this information and data?

A. Yes, the originals had been sent to Montgomery.

Q. That is the information that you have with you in court today is it not?

A. Yes.

Q. I'll review my question to you, please maam. Do you know from your records or by your records how many children were born in Talladega County for the year 1961?

A. There were 1768.

Q. Now do your records reflect how many of those children were white?

A. 1053.

Q. Do your records reflect how many children were negroes or colored?

A. 714.

Q. Now does your record show how many illegitimate children were born in Talladega County during the year 1961?

Mr. Hall: If your Honor please, we object to that question and the answer. It has no bearing on the issues in this case.

The Court: I'll overrule.

Mr. Hall: We want an exception.

A. The total number were 214.

Q. 214 illegitimate children born in Talladega County in the year 1961 is that right?

A. That's correct.

Q. Do your records reflect how many white illegitimate children were born in Talladega County in the year 1961?

A. There were 13.

Mr. Hall: We object to that, it has no probative value.
[fol. 171] The Court: I'll overrule.

Mr. Hall: We except.

Q. What was your answer now?

A. There were thirteen whites.

Q. There were 13 white children born who were illegitimate is that correct?

A. That's correct.

Q. Does your record reflect how many negro children were born in Talladega County for the year 1961 that were illegitimate children?

A. Two hundred—

Mr. Hall: If your Honor please, we would like to interpose the same objection as to the white, and an exception.

A. 201.

Q. 201 negro children born that were illegitimate. Now the term illegitimate as used by the Talladega Health Department and the Bureau of Vital Statistics that you keep these records for, does that mean born out of wedlock?

A. Yes, sir.

Q. And what is commonly referred to in a court of law as bastardy?

A. That's right.

Q. I'll ask you whether or not the Talladega Health Department keeps all records of syphilis in Talladega County for the year 1961?

A. Yes, sir.

Q. Do you have those records with you?

A. I have.

Q. Were these records compiled prior to visitation to your office by Attorney Love and myself?

A. They were.

Q. How many cases do your records reflect that were reported in Talladega County of syphilis in Talladega County for the year 1961?

Mr. Hall: If your Honor please, we would like to interpose objection to that. any question or answer with reference to syphilis, it is our contention that under the law of the State of Alabama and under the United States Constitution, syphilis has not one thing to do with a man's ability to serve as a juror. Under neither statute of our Constitution or enactment of the Congress has any Board, Bureau, Commission, Clerk of a Commission, Solicitor or Court the power to inquire into this case whether a man has syphilis before he is eligible to serve as a juror in this or any other [fol. 172] county.

The Court: I overrule.

Mr. Hall: We want an exception.

Q. You may answer.

A. Will you repeat the question, please..

Q. Read the question back please.

(The court reporter read back the last question, as follows: How many cases do your records reflect that were reported in Talladega County of syphilis in Talladega County for the year 1961?)

A. There were 12 new cases.

Q. How many of those cases were negroes?

A. Eleven were indicated as colored. The twelfth one did not state the color.

Q. In other words, there were 12 new cases. Were there some old cases carried over?

A. We don't keep those with the new cases.

Q. But there was a total of 12 cases, and eleven cases were negro and one case the color, whether white or black is not indicated, is that right?

A. That's correct.

Q. Now, had the Talladega County Health Department or the Bureau of Vital Statistics, did you keep a record on the gonorrhea cases reported in Talladega County for the year 1961?

A. Yes.

Q. How many cases were reported in Talladega County?

A. 26.

Q. Of those—

Mr. Hall: If your honor please, we would like to object to any question to this witness or answers relative to gonorrhea in this county. The issues involved here has to do with the service or non-service of negroes on juries in this county. No statute or law excludes or exempts either white or colored persons with gonorrhea. No statute or law enables or empowers anyone, any official in this county to examine any applicant or prospective juror with reference to gonorrhea. We submit your Honor with or without gonorrhea or otherwise eligible persons in this county should be on the jury roll of this county.

Mr. Love: We are offering this in rebuttal of his allegations that out of 4281 colored in this county they have good character, beyond reproach in their community.

[fol. 173] Mr. Hollingsworth: Your Honor, we are only offering it as a limitation to that aspect; certainly a man that is known to have gonorrhea or syphilis or for that matter to be the father of illegitimate children, the question

is whether or not he would have integrity and good character in his particular community. Further than that, your Honor, it goes to shows, the testimony here shows that we have anywhere from—some witnesses said two, some said four and some said six or seven and some have had seven or eight, some have said eleven, some have said thirteen, negroes in here on the different jury venires. It is undisputed in the testimony that negroes have served on the grand jury since 1953. We submit to the Court that it wouldn't be expected, or shouldn't be expected in this particular community for the same percentages of negroes being in the jury box according to their population or on the jury roll, because there is a difference in the standard of living. There is a difference in the activity shown by these records, and we submit that it is a plain situation as to why there is a difference in percentages. In the allegations they have set forth, your Honor, that there are some 4281 negroes, males, over 21 years of age, and shows that there are 12,125 white males over the age of 21. We submit to your Honor that by figuring that on a percentage basis it is 27 percent, it is actually twenty-six I believe plus. But that 27 percent of the male population in Talladega County over 21 years of age is of the Negro race. We submit, your Honor, and the evidence is before the Court that there is not 27 percent of the males in the jury box negroes. That figure has been estimated before this court anywhere from ten to fifteen percent to eighteen percent, somewhere along in that particular bracket. There is a little difference in the percentage there, may it please the Court, and we submit to your Honor, that we are here to show the standing in the community of the average white male and the average colored male is not exactly the same. These records that we are offering, we submit to your Honor, have probative value to show the difference in this situation.

The Court: I'll overrule the objection.

Mr. Hall: May I submit, your Honor, that we are listening to testimony from a County employee, the Bureau of Public Health and Vital Statistics. We submit, your Honor, that whatever the Solicitor has offered to this point does not tend to prove one iota of his contention. He has simply proven by this witness that her records show that she has a certain number of new cases of syphilis in this county. I could show that her office deals with indigent people or some

persons who are reported who comes to her office or some other charitable institution for treatment. I submit that this is a matter of public notice and knowledge that the members of the white community are in much better shape [fol. 174] financially than the members of the negro community and so far as we know, your Honor, there may be many more white persons suffering from syphilis who are not reported to this lady's office. We further submit that this matter of gonorrhea is no indication of character. The fact that a man has or has not contracted or contacted gonorrhea is not an indication of his moral character, and we submit that it is a matter of public record that this is not true. In the armed services and otherwise, men have been known to contact these diseases without any loss of character otherwise. We further submit that the presence of illegitimacy in this county is no indication of character. It may be an indication of poverty, it may be an indication of a lack of social awareness on the part of the people of this county, but it is no serious indictment of the negroes in this county. We object to the introduction of these records. We say that they do not indict the negroes who are otherwise eligible. We say they are immaterial, that they have no probative value and if your Honor allows them we would like an exception.

The Court: You have one.

Mr. Hollingsworth: May it please the Court, I would like to say this for the record, and if I am in error I stand corrected. We submit the law requires that all medical doctors send in the information to the Talladega County Health Department of any venereal disease contacted in this county. Therefore, we take issue with the attorney's statement that there could be many other cases. We are going by the records and the state law on that particular matter.

Q. Now, do your records reflect how many negro cases there were of that 26?

A. There were nineteen.

Q. How many white cases were there, please maam?

A. Nine.

Q. Would you check that figure again. Did you say 26?

A. That's right. Oh, I made a mistake. There were 19—let me count them to make sure. There were nineteen colored and the other were white.

Q. How many white cases were there?

A. Seven.

Q. All right, thank you. Your witness.

Cross-examination.

Mr. Hall:

Q. Mrs. Morris, are these records compiled by you personally?

A. Yes.

Q. Where do you get the information from which you compile your records?

[fol. 175] A. Public health laws require all doctors in the county to report their communicable diseases to the county health department. These are taken from their reports.

Q. Your information then comes from local physicians?

A. Yes.

Q. Do they report directly to you?

A. They report them to the county health department.

Q. When you say to the county health department, to whom do they go?

A. That's how the letters are addressed to the County Health Department. I have been assigned the duty as Assistant to the County Collaborating Epidemiologist.

Q. You receive the letters yourself and open them?

~~A.~~ The County Health Department opens the letters and passes them on to me.

Q. Can you say who in the Health Department opens them?

A. Dr. J. D. Rayfield.

Q. Can you say that these records are a true indication of all communicable diseases in Talladega County?

A. As far as I know.

Q. Do you have any facts which you might consider and be able to make a yes or no statement to that effect?

A. I would say yes.

Q. That is all.

(Witness excused.)

Miss RUTH HAMNER: Having been by the Court duly sworn, testified as follows:

Direct examination.

Mr. Hollingsworth:

Q. Is this Miss Ruth Hamner?

A. Yes, it is.

Q. Where do you live, Miss Hamner?

A. I live at 409 East Street, Talladega.

Q. Are you employed by the Department of Pensions and Securities?

A. I am the Director of the Talladega County Department of Pensions and Securities.

Q. How long have you been with that department, please maam?

A. I came to Talladega County February 4, 1934 as child welfare worker. I have been Director since the organization of the Department, it was then Public Welfare, now Pensions and Securities, since September, 1935.

[fol. 176] Q. Do you keep records in your office or under your control?

A. They are.

Q. Do you keep record of the total number of people receiving assistance?

A. We accept all applications for public assistance. We have all of them approved. They are approved over my signature and we keep all records in the office. We make all the records in the office.

Q. Are those records kept in an accurate and correct manner?

A. I hope so.

Q. Are they under your control?

A. Directly, yes.

Q. Pursuant to a subpoena, did you bring certain information to court today?

A. Yes, I did.

Q. I'll ask you, how many recipients are receiving public aid in Talladega County for the month of April, 1962?

A. Well, now this is the official statistical record, submitted to the State Department of Pensions and Securities, as of April 30, 1962.

Q. Yes. How many people were recipients of public assistance for that particular month?

A. The total was 3316.

Q. Now, of that particular number how many were negroes, if you know?

A. The records are not kept separately but after I received this request I went through and separated, counted case by case to determine which was white and which was colored.

Mr. Hall: Your Honor, we object to Miss Hamner answering this question further in view of what she herself just said in that the records are not kept according to race, unless it can be clearly shown how she ascertained which was colored and which was white.

Q. I'll ask that. Would you tell the Court, please maam, how you ascertained whether the recipients were white or colored persons in compiling this information.

A. Yes, I would. Each applicant has a separate case folder and is given a number. These records are all kept in our official file. In the first sheet of each application there is the information, one of the questions we have to ask the person and record is, are you white or colored. Of course, if we know, we record it. If not, there is on the first sheet of each one of these records is the information, whether that person is white or colored.

[fol. 177] Q. Now, would you tell us please maam how many colored recipients were receiving aid for the month of April, 1962, in Talladega County, Alabama?

A. How many recipients?

Q. That's right, how many were negroes?

A. The total was 3316 and the number of negroes was 1479.

Q. What was the total number of whites?

A. 1837.

Q. Would you break that down as to percentage, do you know what percentage of the funds were given to the negro population?

A. Well, the total amount spent as shown by the official report and the payrolls, was \$181,059.50.

Q. What I am speaking of, please maam, is percentage.

A. The total receiving was 3316, the total number of whites was 1837 which constitutes fifty-five and four tenths

percent white and the total number of negroes was 1479, which constitutes forty four and six tenths of those receiving.

Q. In other words 44.6 percent of the welfare money spent went to the negroes is that correct?

A. Yes, that's right.

Q. That is all.

Cross-examination.

Mr. Hall:

Q. Would your records indicate whether or not these recipients of welfare assistance were male or female?

A. I do not have that official record with me. Our records do indicate it.

Q. Mr. Hollingsworth didn't ask you to ascertain those figures?

A. No.

Q. You do not know whether this 3316 persons were women or men?

A. Not—I don't have the record with me. I would have to go through and count again to get that. Our records do indicate it.

Q. I believe from your previous answers there is an indication that you are an experienced social worker and have worked at it for some time in this county?

A. Well, I have worked since 1934 in this county.

Q. Is it not your experience that the average recipient of welfare payments is a female or a child?

A. I can't say that. Let me say this. Of those who are receiving, there are 2205 who are old pensioners. That of course is made up of white and colored, but there is a very [fol. 178] large number of colored males that are on that old age pension roll particularly as well as the white or colored female, so I wouldn't be able to say that.

Q. Is it not a matter of statistical fact that the females outlive the males, that the life expectancy of the American female of whatever color is longer than the American male?

A. I don't have facts to substantiate that but I believe that is true. I think it is true.

Q. Miss Hamner, your records then would be of no use to us in trying to ascertain whether or not these persons were male or female?

Mr. Hollingsworth: We object to that question. That calls for a conclusion and invades the province of the court.

The Court: I sustain.

Q. We would like an exception. Miss Hamner, what are the requirements with reference to ownership of property in so far as these persons who receive old age assistance is concerned?

A. It is rather generous now. It depends on the assessed valuation in the state.

Q. Can they own as much as \$300.00 worth of property and still receive this assistance?

A. Three thousand, not three hundred.

Q. They could own \$3,000.00 worth of property and you would still give them assistance is that correct?

A. If they meet the eligibility requirements. It depends on the amount of income that they have.

Q. Assuming that they own real estate worth anything under \$3000.00 and otherwise met your requirements as to income, had no other income or very little other income, how much income can they have in addition to this property?

A. The state has set up certain standards for working out, for deciding need and there is a certain amount that is called a basic need set up by the State Board of Pensions & Security which applies to all alike and depending on what income they have coming in, now if that property—you asked about property—if that property can be made useful then they are expected to make use of it, to have some income, if it is there and they cannot make use of it other than its forming a homestead, they are allowed to consider 160 acres as the homestead basis, if that is what the records of the assessors office show.

Q. So they can have a homestead.

[fol. 179] A. Yes. If it is not assessed more than that.

Q. They can have some income and still be eligible for assistance?

A. Yes.

Q. Can they vote, I mean voting—

A. —that doesn't enter into it.

Q. If they could read or write.

A. That doesn't have a thing to do with it.

Q. They may be able to own up to \$3000.00 worth of property!

A. Yes.

Q. They may be able to read or write?

A. Yes.

Q. In health a factor, generally, they may be in excellent health, is that true?

A. Well, that would be true. That would effect it if they are under 65. If they are over 65 it would not be a factor.

Q. Do you have very many adults under 65 on your welfare list?

A. We have 43 blind, we have 695 aid to dependent children families with 2218 children, 30 children we are boarding in homes that are deprived entirely of parents, and 342 that are rated as permanently and totally disabled.

Q. Except for the permanently and totally disabled and the blind most of the others are children or mothers of dependent children?

A. In that aid to dependent children group, I think that is what you are speaking of, the definition there is that the children in the family must be under 18, they must be deprived of parental support, that is either by the death of the parent or the disability, physical disability of the parent to support the family.

Q. That is all.

Redirect examination.

Mr. Hollingsworth:

Q. These illegitimate children, do you have that many of those on your welfare roll?

A. Now, I was not asked to count that. We do have to report that occasionally to the state department. We have to send in reports.

Q. Do you have a judgment as to how many illegitimate children in this county now are receiving welfare?

A. No, I wouldn't be able to answer that question.

Q. Would it be into the hundreds?

A. Well, off-hand I would think it would be, but I can't say that officially.

Q. Do you have more negro illegitimate children on your roll than you have white illegitimate children?

[fol. 180] Mr. Hall: Your Honor, we object to that. Miss Hamner has testified that she has no knowledge with ref-

erence to the question counsel is asking. We object to the question because it is incompetent and it is immaterial and it has absolutely no value at all in this hearing on any point, even if the witness had indicated that she could answer it.

Q. I don't want her to answer it unless she knows.

The Court: Do you know, Miss Hamner?

A. We have a record of it at the office but I was not asked to bring that information. I don't have it with me. I feel that I really couldn't answer that honestly without the records.

Q. We will withdraw the question.

That is all, Miss Hamner. Thank you very much.

(Witness excused.)

Mr. Hollingsworth: May it please the Court, since this county is operating under a local act we would like to get this in the record so that the Appellate Court will find it. From Acts of Alabama, Special Regular Session, of 1955, Volume Two on page 1081, Act No. 475, House Bill No. 1005, introduced by Payne and McKay, approved September 9, 1955.

Mr. Billingsley: Would you read in there the title of that act.

Mr. Hollingsworth: It says, AN ACT To further regulate the preparation of jury rolls and the filling and refilling of jury boxes of Talledega County and to provide for the method of serving notice upon jurors requiring their attendance for jury service in said county.

Mr. Billingsley: Also Title 30 of the Code of Alabama still applies to this county.

Mr. Hall: Movant rests and we don't care to argue.

The Court: Did you get the stipulation into the record about which you had a discussion earlier?

Mr. Billingsley: Yes, sir. In other words, 16 names are written into the jury roll in ink or pencil, in the jury roll compiled October 2, 1961.

The Court: Is that everything for the record?

Mr. Hollingsworth: Yes, sir.

Mr. Billingsley: Yes, sir.

[fol. 181] Court Reporter's Certificate—No. One of Two Certificates (omitted in printing).

[fol. 182] Clerk's Certificate No. One to foregoing transcript (omitted in printing).

[fol. 183] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

Case No. 6134

State of Alabama, Talladega County.

STATE OF ALABAMA,

vs.

ROBERT SWAIN, Defendant

MOTION TO QUASH VENIRE AND RULING THEREON—
June 11, 1962

Comes the Defendant, Robert Swain, by his attorneys and makes this his Motion to Quash the Venire or array drawn on to-wit, the 29th day of May, 1962, and in support of said Motion alleges the following:

1. The defendant is a member of the Negro race.
2. Members of the Negro race, otherwise qualified to serve have been systematically excluded from service on the aforesaid jury, or discriminated against in the organization of said jury, in that no member of the Negro race has been drawn for service thereon; or that a mere token number have been drawn for service thereon, that there is no probability of them actually trying or participating in the trial of this, or any other case.
3. Defendant avers that the white population of Talladega County, Alabama, is approximately 12,125 (males over 21 years) and the Negro population (males over 21 years) is 4,281, and that since the year of 1953, and before, and continuing to this date, there has been a uniform prac-

tice by the jury board of Talladega County, Alabama; of discriminating against prospective Negro jurors solely because of their race or color, either by leaving their names off the jury roll altogether or by including so few of their names in the jury box from which the venire is drawn, as to keep the number of Negroes actually summoned for jury duty at a token amount.

4. Defendant avers the existence of a system or practice in the drawing or organization of juries to serve in Talladega County, Alabama, deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries by either excluding them from the venire altogether or by keeping the number included so small that they can be systematically and uniformly struck from the venire and prevented from serving in the trial of any case.

5. Defendant further avers that members of the Negro race are, solely because of their race and color, arbitrarily, intentionally and systematically excluded from jury service or discriminated against in the selection of persons for jury duty in that the great majority of those qualified to serve in Talladega County, Alabama, are not included on the jury rolls, or their names are left out of the jury box, so that only a token number can ever be included on a venire and none have ever served on a petit jury; and [fols. 184-187] defendant avers that the venire drawn on to-wit: the 29th day of May, 1962, was selected in keeping with this practice and that unless this Honorable Court grants this his Motion to Quash the said venire, he will be deprived of his rights as guaranteed by the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, the defendant prays that this Court will take notice of this his Motion to Quash the Venire in this cause, and that your Honor will, after consideration of the evidence and proof which the defendant offers to make, grant said Motion and allow the defendant his costs herein and such further and other additional relief as may appear to this Court to be equitable and just.

Respectfully submitted, /s/ Robert Swain

Sworn to and subscribed before me this 11th day of June, 1962.

/s/ Huel M. Love, Notary Public, /s/ Orzell Billingsley, Jr., /s/ Peter A. Hall, Attorneys for Defendant.

Filed in office this the 11th day of June, 1962.

/s/ A. K. Wood, Clerk.

The foregoing Motion being presented this 11th day of June, 1962, is hereby set for hearing before the Honorable William C. Sullivan, Judge, on the 11th day of June, 1962, at 9:00 o'clock A.M.

/s/ William C. Sullivan, Judge.

We hereby certify that we have served a copy of the above Motion on the Honorable W. E. Hollingsworth, Jr., on this the 11th day of June, 1962.

/s/ Orzell Billingsley, Jr., Attorney for Defendant.

On this the 11th day of June, 1962, the foregoing Motion being considered and understood, it is the opinion and judgment of the Court that said Motion be, and the same is hereby overruled.

To which ruling of the Court the defendant is granted an exception.

Done in open Court this the 11th day of June, 1962.

/s/ William C. Sullivan, Judge.

[fol. 188] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA,

29TH JUDICIAL CIRCUIT

Case No. 6134

STATE OF ALABAMA, Plaintiff,

VS.

ROBERT SWAIN, Defendant

Transcript of hearing—June 11, 1962

Be it remembered that heretofore, on Monday, the 11th day of June, 1962, in the presence of the defendant, the above entitled cause came on for hearing before the Honorable William C. Sullivan, Judge of the 29th Judicial Circuit of Alabama, and a jury.

APPEARANCES:

For the State of Alabama: W. E. Hollingsworth, Jr., Circuit Solicitor from the 29th Judicial Circuit of Alabama, Talladega, Alabama, H. M. Love, Special Prosecutor, Talladega, Alabama.

For the Defendant: Orzell Billingsley, Jr., Birmingham, Alabama, Peter A. Hall, Birmingham, Alabama.

(The State and the Defendant announcing ready for trial, and before the jury was struck the following proceedings occurred):

Mr. Billingsley: We would like the right to submit a written motion on behalf of the Defendant's motion to quash the venire and we would like the record to show our request from the State that of this general venire and special venire we see the names of one hundred male citizens of which number we find there are eight negroes listed thereon.

Mr. Hollingsworth: Now, if it please the Court, there were a certain number excused. If he will get it to the exact number excused or not found or in the hospital. Our knowl-

edge is not as to one hundred, it is as to the ones identified in court this morning.

Mr. Billingsley: We are contending there are only eight on this general or special venire, as to who was excused has nothing to do with the list.

Mr. Hollingsworth: We have no disagreement as to the particular negro names identified in open court this morning. But we do contend and the clerk's records will show [fol. 189] that out of the one hundred there were several that were either in the hospital or not found. "We object to him using the figure one hundred."

Mr. Billingsley: We find on the venire the following names: No. 15, Clarence Christian, 20, Lawrence Dickerson, 22, Joe English, 41, B. N. Mabra, 46, John T. Morris, 60, Cicle Rivers, 70, Wilby Wallace, Jr., and on the special venire we find the name, Cunningham; Nash, those are members of the negro race, and they are the only ones listed as negroes.

Mr. Hollingsworth: They are not on the list as negroes.

Mr. Billingsley: They are the only ones we have identified as being negroes.

The Court: This is the stipulation agreed upon at the time of the hearing on the motion to quash the indictment. See if this is right. And see if this is agreeable at this time.

STIPULATION BETWEEN COUNSEL RE EVIDENCE AND VENIRE

It is stipulated by and between the attorneys for the Defendant and the Solicitor representing the State of Alabama, that all legal and competent evidence submitted either for the Defendant or for the State in connection with the motion to quash the indictment in this cause, which said motion was heard before this court beginning May 24, 1962, is hereby submitted in support of and opposed to the motion to quash the jury venire in this cause filed this date and is to be considered by the court as if taken in connection with a hearing on this motion.

In addition thereto it is stipulated and agreed by the said parties that the said jury venire of 100 jurors includes eight members of the negro race.

Mr. Billingsley: Yes, sir.

Mr. Hollingsworth: Yes sir.

Mr. Billingsley: We are not going to argue the motion to quash the venire.

The Court: I will overrule the motion to quash the venire.

Mr. Billingsley: We take exceptions.

Mr. Billingsley: Your Honor we would like to question each juror separately and out of the presence of each other.

The Court: I will overrule that.

Mr. Billingsley: We take exceptions.

The Court: Let the record show that at the time the counsel for the Defendant made the motion to examine each member of the jury panel, one at a time and out of the presence of each other, that the Court at that time was proceeding to place twelve members of the jury panel in the jury box at one time and affording counsel for the [fol. 190] State and for the Defendant the right to interrogate each juror, one at a time.

(The State and the Defendant having previously announced ready for trial, and the preliminaries having been completed, a jury was empaneled and sworn to try the issues, all in due course of law.)

INSTRUCTIONS TO THE JURY AND WITNESSES

The Court: Gentlemen of the jury, it is now 12:10 and we will take our noon recess. I'll instruct you at this time, throughout this trial and until it is concluded, it is going to be necessary that you all remain together during any recess, and in custody of the court's bailiff. I'll instruct you, while we are at recess don't discuss the case among yourselves, and don't allow anyone to discuss it with you or in your presence. At any time, during the course of the trial, don't try to make up your minds as to what you are going to do in the case, until you have heard all of the evidence and the court's charge as to the law in the case.

So there will be no misunderstanding about it, we will make arrangements for your meals, and your lodging, if that becomes necessary at night, and you of course have to travel from the courthouse to the restaurant and to the place that you will stay overnight in the event the case goes over until tomorrow. When you are traveling back and forth and out of the courtroom, no matter how innocent it

may seem, you are not to wave at anybody or talk to them or allow anybody to come up to you and talk to you, and you are not supposed to separate. In other words, if one of you have a coat or something you left in your car, if you are worried about it, the bailiff might get a deputy sheriff to get it for you, but you are not to leave the rest of them and get it by yourself. This is a precaution that the law requires and I want to instruct you fully at this time so there will not be any misunderstanding at all about it. You will have a bailiff, an officer of the court, with you at all times, but I just want to make that clear so there will not be any misunderstanding about it.

At this time we will take our noon recess.

Are you satisfied with those instructions, for the State?

Mr. Hollingsworth: Yes, sir.

The Court: For the defendant?

Mr. Billingsley: Yes, sir.

The Court: At this time we will take our noon recess. You will go with the bailiff. Come back at 1:30.

[fol. 191] (After recess, court reconvened, with the defendant being present in court, counsel as before).

The Court: Do you want the rule?

Mr. Hollingsworth: Yes, sir.

The Court: I'll ask that the witnesses in this case please stand. Now, during the time this case is being tried and until it is concluded, it is going to be necessary that the witnesses remain out of the hearing of the court. We'll ask you to go with the bailiff to the witness room. When you are needed as a witness we will call your name over a speaker we have back there. When you hear your name called, come into the courtroom, take a seat in the witness chair and raise your right hand to be sworn as a witness. During the time this trial is in progress, don't discuss the case among yourselves, nor allow anyone to discuss the case with you, nor in your presence, with the exception of the attorneys in the case.

(The witnesses left the courtroom with the bailiff).

Mr. Hollingsworth: May it please the Court, we would like Jennie Sue Butterworth, the prosecuting witness to be excused from the rule. The Sheriff is over there but I

understand that as an officer of the court he doesn't have to go to the witness room.

Mr. Billingsley: That is all right.

Your Honor, we would like to make a motion before Mr. Hollingsworth makes his statement to the jury. The jury has been sworn, has it not, your Honor.

The Court: Yes.

MOTION TO DECLARE VOID THE PETIT JURY SELECTED AND RULING THEREON

Mr. Billingsley: At this time the Defendant moves this Honorable court to declare void the petit jury selected to try this cause, and as grounds for said motion sets out and assigns the following separately and severally, that the Defendant is a negro citizen of the State of Alabama and the United States and under the Constitution and laws of Alabama and the Constitution of the United States is entitled to a trial by jury of his peers, however, there are no negroes on the jury selected to try this cause; (2) The absence of any negroes on the jury selected to try this cause deprives this defendant of equal protection of the law and due process of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States; (3) That because of the systematic and arbitrary method of selecting the names of qualified male citizens by the jury commission of Talladega County, Alabama, it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause; (4) That because of the systematic and arbitrary method of selecting the names of qualified male citizens, negro male citizens, by the Jury Com-[fols. 192-361] mission of Talladega County, Alabama, the State can, and did in this case, readily strike members of the negro race and that there were only six negroes remaining on the final venire in this cause, in violation of the Fourteenth Amendment of the Constitution of the United States and also the Constitution of the State of Alabama; wherefore, the Defendant prays that this Court will grant this motion in this cause.

The Court: I'll overrule the motion.

Mr. Billingsley: We take exceptions your Honor.

The Court: You are entitled to an exception.

(The Solicitor read the indictment and made opening statement to the jury on behalf of the State of Alabama.)

(Counsel for the Defendant made opening statement to the jury on behalf of the Defendant).

[fol. 362] (The Bailiff informed the Court that the jury was ready to report, and in the presence of the defendant, counsel as before, the jury was brought into the court-room.)

The Court: Gentlemen, have you reached your verdict?

Juror: We have.

The Court: Is this your verdict?

Juror: It is.

The Court: (reading verdict) "We the jury find the defendant guilty of rape as charged in the indictment and fix his punishment at death". signed S. Arthur Morrison, Foreman.

Is there anything for the State, before the jury is dismissed?

Mr. Hollingsworth: No, sir.

The Court: Is there anything for the Defendant?

Mr. Hall: No, sir.

The Court: Gentlemen, this concludes your services in this case.

[fol. 363] Court Reporter's Certificate—No. Two of two certificates (omitted in printing).

[fol. 364]. IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

REFUSED CHARGE

Charge No. 1. I charge you, gentlemen of the jury, that if you believe the evidence in this case, then you must find the defendant not guilty.

Refused:

/s/ W. C. Sullivan, Judge

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

JURY VERDICT

We the jury find the defendant guilty of rape as charged in the indictment and fix his punishment at death.

/s/ S. Arthur Morrison, Foreman.

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

Case No. 6134

[Title omitted]

MOTION FOR NEW TRIAL—Filed June 30, 1962, and
ORDER OF DENIAL—August 21, 1962

Now comes the defendant, in the above entitled cause, by his attorneys and moves the Court to set aside the verdict of the jury and the judgment rendered thereon to-wit, the 12th day of June, 1962, and to grant to the defendant a new trial; and as grounds for said Motion, the defendant sets down and assigns, separately and severally, the following:

1. The verdict of the jury is contrary to the evidence in the case.
2. The verdict of the jury is contrary to the law in the case.
3. The verdict of the jury is contrary to the great preponderance of the evidence in the case.
4. The verdict of the jury is contrary to the evidence and the law in the case.
5. The verdict of the jury is not sustained by the great preponderance of the evidence in the case.
6. The evidence of the jury was contrary to the weight of the evidence in the case.
[fol. 365] 7. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.
8. For that the verdict of the jury is not sustained by the great preponderance of the evidence and is contrary to both the law and the facts in the case.

9. For that the verdict of the jury was such as to indicate bias, prejudice or other improper motive.
10. In that the verdict of the jury is based on bias, prejudice and passion against the defendant.
11. For that the sentence is excessive.
12. For that the verdict and judgment is so grossly excessive, in that there is no competent testimony that should cause the jury to sentence the defendant to such a high decree of punishment.
13. For that there existed a material variance between the indictment and the proof.
14. For that the evidence in the case is not sufficient to justify a legal conviction for the crime of rape.
15. For that the evidence in this case fails to prove elements essential to crime of rape.
16. For that the evidence in this cause is not sufficient to prove beyond a reasonable doubt every material ingredient of the offense of rape.
17. For that the Court erred in overruling objections by the defendant to the introduction of evidence and exhibits offered on behalf of the State of Alabama which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.
18. For that the Court erred in sustaining objections, by the State of Alabama to evidence the defendant sought to introduce in his behalf.
19. For that the Court erred in overruling objections by the defendant to the introduction of evidence and exhibits offered on behalf of the State of Alabama in this cause.
20. The Court erred in overruling the defendant's Motion to exclude the evidence in this cause.
21. For that the Court erred in overruling the defendant's several objections throughout the hearing of this cause.
22. For that the Court erred in overruling the defendant's Motion to Quash The Indictment, on constitutional grounds, before putting defendant to trial in this cause.
23. For that the Court erred in overruling defendant's Motion to Quash The Venire on grounds that Negroes had [fol. 366] been systematically excluded therefrom, because of their race or color in violation of rights and privileges guaranteed him by The Fourteenth Amendment to the Constitution of the United States.
24. For that the Court erred in denying defendant's

Motion to declare void and illegal the petit jury drawn to try defendant in this cause, in that there were no Negroes serving on said petit jury.

25. For that the Court erred in denying defendant's Motion To Quash Venire and Motion to Quash Indictment returned against the defendant on the grounds that Negroes qualified for jury service in Talladega County, Alabama, are arbitrarily, systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution.

26. That the Court erred in denying the defendant's Motion to Quash Indictment returned against defendant in this cause, in that no negroes, or a mere token number, served on the Grand Jury which returned aforesaid indictment against defendant in this cause, and in the face of the great preponderance of the evidence presented to show that few, if any, Negroes had ever served on a Grand Jury in Talladega County, Alabama, in modern times.

27. For that the Court erred in overruling defendant's Motion to exclude the evidence in this cause, and for judgment.

28. For that the Court erred in refusing to declare a mistrial in the case on the grounds that the Solicitor in his arguments to the jury, made statements relative to the refusal of the defendant to take the stand and deny having committed rape, although defendant made proper objection and motion on grounds that he was being deprived of equal protection of the law and due process of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States.

29. For that the Court erred in overruling defendant's Motion for a Mistrial on the grounds that Mr. Love, Special Prosecutor for the State in arguing to the jury after the evidence was in, asserted that defendant had gone to the home of Mrs. Weldon for the purpose of having sexual relations with her, although no evidence to this effect had been introduced in the trial. Defendant took due exception to the Court's ruling.

30. For that the Court erred in overruling Defendant's Motion for a mistrial on the grounds that one of the attorneys prosecuting for the State in his argument to the jury referred to defendant as a "Bootlegger," after the evidence

and testimony was in, although no testimony or evidence had been introduced going to show that defendant was a bootlegger, to which ruling the defendant duly excepted.

31. For that the Court erred in not declaring a mistrial because of the highly prejudicial and improper argument [fol. 367] made to the jury by the two attorneys prosecuting for the State, after all evidence and testimony was in, although defendant made apt and proper motions for mistrial.

32. For that the refusal to grant defendant's several motions for mistrial based upon prejudicial and illegal argument of counsel for the State, defendant was deprived of due process of the law and equal protection of the law guaranteed him by the Laws and Constitution of Alabama and the Fourteenth Amendment to The Constitution of the United States.

33. The Court erred in permitting Mr. Robert Johnson of the State Toxicologist's Office to testify in behalf of the State of Alabama over the several objections of the defendant's, to which ruling the defendant duly took exceptions.

* /s/ Orzell Billingsley, Jr., /s/ Peter A. Hall,
Attorneys for Defendant.

The foregoing Motion being presented this 2nd day of July, 1962, is hereby set for hearing before the Honorable William C. Sullivan, Judge, on the 21st day of August, 1962, at 10:00 o'.

/s/ William C. Sullivan, Judge.

I hereby certify that I have served a copy of the above Motion on the Honorable W. E. Hollingsworth, Circuit Solicitor of Talladega County, Alabama, and on the Honorable Huel M. Love, Special Prosecutor, on this the 27th day of June, 1962, by mailing a copy to their office postage prepaid.

/s/ Orzell Billingsley, Jr., /s/ Peter A. Hall,
Attorneys for Defendant.

[File endorsement omitted.]

The foregoing motion coming on to be heard was this day submitted to the Court for ruling and said motion being considered and understood, it is the considered judgment of the Court that said motion should be denied and overruled;

It is therefore ordered, adjusted and decreed that said motion be and the same is hereby denied and overruled.

Done this the 21st day of August, 1962.

/s/ William C. Sullivan, Circuit Judge.

[fol. 368] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA,

Case No. 6134

MINUTE ENTRY IN CIRCUIT COURT

On this the 25th day of April, 1962, came William E. Hollingsworth, Jr., Solicitor for the 29th Judicial Circuit of Alabama, who prosecutes for the State of Alabama, and also came the defendant, Robert Swain, in his own proper person and by his attorneys, and the said defendant, Robert Swain, being duly called for arraignment does hereby present Motion to Quash Indictment, the same being considered by the Court said motion is hereby set for hearing before the Honorable William C. Sullivan, Judge, on the 24th day of May, 1962, at 10:00 o'clock, A. M. Arraignment is deferred pending hearing and order on Motion.

On this the 24th day of May, 1962, hearing on Motion begins.

On this the 25th day of May, 1962, the foregoing Motion being considered and understood, the Court having heard and considered the evidence offered in support of said Motion and evidence offered in opposition to said Motion, the Court finds and it is the considered judgment of the Court that the allegations contained therein are untrue and not supported by the evidence and that said Motion should be denied.

It is therefore, ordered, adjudged and decreed that said Motion be, and the same is hereby denied, and the defendant is hereby allowed an exception to this ruling of the Court.

On this the 29th day of May, 1962, comes William E. Hollingsworth, Jr., Solicitor for the 29th Judicial Circuit of Alabama, and the defendant being present in open court in person and by attorney representing him, and upon being duly arraigned and hearing the indictment read against him, pleads not guilty thereof and not guilty by reason of insanity, and it appearing to the Court that the defendant is indicted and charged with a capital felony, it is therefore ordered by the court that this cause be and the same is set down for trial for June 11, 1962. It is further ordered by the court that the sheriff summon not less than 50 persons and not more than 100 persons qualified to serve as jurors for the selection of a jury to try this cause, to-wit: 100 persons, and it appearing further to the court, to-wit: 75 persons have been drawn by the presiding Judge of this Court in open court to serve as regular jurors for the session of the present term of this court beginning on the day on which this cause is set for trial, it is further ordered by the court that the sheriff bring into open court the box containing the names of the jurors of Talladega County, Alabama, and that the judge presiding shall draw from the said box, the names of, to-wit: 25 persons to serve as special jurors in the selection of the jury to try this cause, and which is accordingly done in open court in the presence of the defendant and of his counsel; and that the regular jurors so drawn for said week, together with the special jurors so drawn for the trial of this cause shall constitute [fol. 369] the venire from which to select the jurors for the trial of this cause. The Clerk of this Court is directed by the court to issue proper venire facias to the sheriff of this County commanding him to serve those persons so drawn as special jurors for the trial of this cause, together with those drawn as regular jurors for said session of this Court beginning on the day on which this cause is set for trial, to be and appear on this court on the said day at 9:00 o'clock A. M. and serve as such jurors and the Sheriff shall forthwith execute and return said venire facias as is required by law. The Sheriff is directed by the Court forthwith to serve on the defendant a list of the names of the regular jurors drawn for the session of this present term of court beginning on the day on which this cause is set for trial, and a list of the names of the special jurors drawn

for trial of this cause, together with a copy of the indictment in this case, as is required by law.

On this the 11th day of June, 1962, comes the defendant in person and by his attorneys and moves the Court to Quash the Venire in this cause. The said Motion being considered and understood by the Court, it is the opinion and judgment of the Court that said Motion be and the same is hereby overruled, to which ruling of the Court the defendant is granted an exception.

On this the 11th day of June, 1962, comes William E. Hollingsworth, Jr., Solicitor for the 29th Judicial Circuit of Alabama, and comes Honorable Huel M. Love, Special Prosecutor for the State of Alabama, and also comes the defendant, Robert Swain, in his own proper person and by his attorneys, and the said defendant being duly arraigned heretofore on the 29th day of May, 1962, upon said indictment, for his plea thereto, says that he is not guilty, and not guilty by reason of insanity. Thereupon came a jury of good and lawful men, to-wit: S. Arthur Morrison, and eleven others, who being impanelled and sworn according to law, enters into trial of this cause. This the 12th day of June, 1962, trial of this cause continues.

On this the 12th day of June, 1962, came the jury of good and lawful men, to-wit: S. Arthur Morrison, and eleven others, who heretofore being impanelled and sworn according to law, upon their oaths say: "We the jury find the defendant guilty of rape as charged in the indictment and fix his punishment at death."

It is therefore considered and ordered by the Court that the defendant is guilty of rape as charged in the indictment and the said Robert Swain, being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing.

It is therefore considered and ordered by the Court, and it is the judgment and sentence of the Court, that at Kilby Prison, Montgomery County, Alabama, on Friday the 7th day of September, 1962, on that day the Warden of Kilby Prison or such other officer as may be authorized by law, shall execute the said defendant Robert Swain, by causing [fol. 370] to pass through his body a current of electricity of sufficient intensity to cause death, such current to be applied and continued through his body until he is dead.

And the said Robert Swain being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing.

It is therefore considered and ordered by the Court, and it is the judgment and sentence of the Court that at Kilby Prison, Montgomery County, Alabama, on Friday the 7th day of September, 1962, on that day, the Warden of Kilby Prison or such other officer as may be authorized by law, shall execute the said Robert Swain by causing to pass through his body a current of electricity of sufficient intensity to cause death, such current to be applied and continued through his body until he is dead.

And before passing sentence, the Court proceeds to ascertain by examination of such convict, Robert Swain, and other evidence, that such convict, Robert Swain, was by trade or occupation a laborer, and that the convict is of the male sex, negro race, and is about 20 years of age and his physical condition is good.

It is further ordered by the Court that the Clerk of this Court shall issue the necessary warrant for the execution of the said defendant as required by law.

The defendant, Robert Swain, by and through his attorneys gives notice of Appeal, execution of sentence imposed on said defendant is hereby suspended pending the outcome of said appeal. It is further ordered by the Court that defendant, Robert Swain, remain in custody of the Warden of Kilby Prison pending such appeal and the Sheriff of this County is hereby authorized and directed to transfer said prisoner, Robert Swain, to said Kilby Prison immediately.

And now on this the 2nd day of July, 1962, comes the defendant by and through his attorneys and moves the Court to set aside the verdict of the jury and the judgment of the Court heretofore rendered and grant unto him a new trial in this cause, which motion is continued for argument and submission until the 21st day of August, 1962, at 10:00 A. M.

On this the 21st day of August, 1962, the foregoing motion coming on to be heard and this day submitted to the Court for ruling and said motion being considered and understood, it is the considered judgment of the Court that said motion should be denied and overruled;

It is therefore ordered, adjudged and decreed that said motion be and the same is hereby denied and overruled.

[fol. 371] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

[Title omitted]

CERTIFICATE OF APPEAL

I, A. K. Wood, Clerk of the Circuit Court of Talladega County in and for said County and State, do hereby certify that in the above stated case, which was tried and determined in this Court on the 12th day of June, 1962, and the defendant convicted by a jury of the offense of rape, and that on the 12th day of June, 1962, said defendant was sentenced to death, which said sentence was suspended pending an appeal to the Supreme Court of Alabama.

I further certify that on this the 12th day of June, 1962, the defendant gave notice of an appeal to the Supreme Court of Alabama.

Witness my hand and the seal of this Court, this the 13th day of June, 1962.

/s/ A. K. Wood, Clerk of the Circuit Court of Talladega County, Alabama.

[fol. 372] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

[Title omitted]

CITATION ON APPEAL—Issued June 13, 1962

To: William E. Hollingsworth, Jr., Circuit Solicitor and Huel M. Love, Special Prosecutor for State.

Whereas, Robert Swain has taken an appeal from the judgment of said Court, rendered at the Spring Term, 1962, thereof, in the above stated cause, returnable to the Fall Term, 1962, of the Supreme Court of Alabama:

Now, you are therefore cited to appear at the Fall Term,

1962, of said Supreme Court, to defend on said appeal, if you shall see proper so to do.

Witness this 13th day of June, 1962.

/s/ A. K. Wood, Clerk.

Issued June 13, 1962.

/s/ A. K. Wood, Clerk.

Executed by serving a copy on William E. Hollingsworth, Jr. and on Huel M. Love, this the 14th day of June, 1962.

/s/ Luke Brewer, Sheriff.

[fol. 373] IN THE CIRCUIT COURT OF TALLADEGA COUNTY,
ALABAMA

[Title omitted]

Case No. 6134

APPELLANT'S STATEMENT OF INDIGENCE—Filed June 30, 1962

Comes the Defendant, Robert Swain, in the above styled cause, and herewith files this affidavit in conformity with Title 15, Section 382(1) of the Code of Alabama 1940.

Before me the undersigned authority personally appeared Robert Swain, the defendant in the case of the State of Alabama vs. Robert Swain now pending in the Circuit Court of Talladega County, Alabama, and the said Robert Swain being duly sworn says: My name is Robert Swain. I am the indigent appellant entitled to an automatic appeal as provided by law, and I am without sufficient funds to pay the Court Reporter his lawful fee for transcribing the testimony and other proceedings had at the trial of said cause, nor am I able to pay any expenses involved in the trial and appeal of this case.

/s/ Robert Swain.

Sworn to and subscribed before me this 28th day of June, 1962.

/s/ Joe M. McSween, Notary Public.

[File endorsement omitted.]

The Defendant in the above entitle cause who was heretofore convicted of rape, and sentenced to death, is hereby given permission to file with the Clerk of the Circuit Court a statement verified by his oath that he is an indigent appellant as defined by law. Acts 1943, Page 217, No. 249, Code 1940 Title 15, Section 382(1) Et Seq. Approved June 24, 1943.

/s/ William C. Sullivan, Circuit Judge.

[File endorsement omitted.]

[fol. 374] The foregoing statement of indigence having been presented to the Court and same being considered and understood and upon investigation of the allegations contained therein the Court is reasonably satisfied as to the truth of said allegations; finds that the defendant is an indigent defendant and is entitled to a transcript of the evidence in said case as otherwise provided by law, that said defendant has legal counsel of his own choice previously retained and has not requested the appointment of legal counsel.

It is therefore, ordered, adjudged and decreed that the official court reporter for the 29th Judicial Circuit prepare a transcript of the proceedings and file same with the Circuit Clerk as provided by law. Said Court Reporter to be compensated as provided in such cases.

/s/ William C. Sullivan, Circuit Judge.

[fol. 375] Clerk's Certificate No. 2 to foregoing transcript (omitted in printing).

[fol. 376] [File endorsement omitted.]

IN THE SUPREME COURT OF ALABAMA

7th Div. No. 581

No. 6134

(Criminal Cases.)

ROBERT SWAIN, Appellant,

vs.

THE STATE OF ALABAMA, Appellee.

The State of Alabama, Talladega County, The Circuit Court of Talladega County.

CERTIFICATE OF APPEAL—Filed June 15, 1962

I, A. K. Wood, Clerk of the Circuit Court of Talladega County, in and for said County and State, do hereby certify that in the above stated case, which was tried and determined in this Court on the 12th day of June 1962, and the defendant convicted by a Jury of the offense of Rape, and that on the 12th day of June 1962, said defendant was sentenced to death in the electric chair, which said sentence was suspended pending an appeal to the Supreme Court of Alabama.

I further certify that on this the 12th day of June 1962, the defendant gave notice in writing of an appeal to the Supreme Court of Alabama.

Witness my hand and the seal of this Court, this the 12th day of June 1962.

/s/ A. K. Wood, Clerk of the Circuit Court of Talladega County, Alabama.



[fol. 377] IN THE SUPREME COURT OF ALABAMA

The Court Met Pursuant to Adjournment

Present: All the Justices

7th Div. 581

Talladega Circuit Court, No. 6134

ROBERT SWAIN,

vs.

THE STATE OF ALABAMA

ORDER OF SUBMISSION—January 17, 1963

Come the parties by attorneys and submit this cause on briefs in lieu of oral argument for decision.

[fol. 378] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

Judicial Department

Special Term, 1963

7 Div. 581

ROBERT SWAIN,

v.

STATE OF ALABAMA

Appeal from Talladega Circuit Court

OPINION—Filed September 5, 1963

GOODWYN, Justice.

Robert Swain, a Negro, was indicted in Talladega County for the rape of a seventeen year old white girl, found guilty, and sentenced to death. His appeal here is under the pro-

visions of the automatic appeal statute. Act No. 249, appvd. June 24, 1943, Gen. Acts 1943, p. 215; Recompiled Code 1958, Tit. 15, § 382(1), et seq.

[fol. 379] Appellant filed motions to quash the indictment and the trial venire on the ground that Negroes were habitually, intentionally, and systematically excluded from the jury rolls of Talladega County, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The motion to quash the indictment was overruled after the taking of considerable evidence at an oral hearing before the trial court. The court made a finding that the allegations of the motion "are untrue and not supported by the evidence."

The parties stipulated "that all legal and competent evidence submitted either for the defendant or for the state in connection with the motion to quash the indictment" was to be submitted "in support of and opposed to the motion to quash the jury venire" and was "to be considered by the court as if taken in connection with a hearing on this motion." The motion to quash the trial venire was also overruled.

Appellant was represented at his arraignment by two attorneys of his own choice. At that time he entered pleas of "not guilty" and "not guilty by reason of insanity." The same counsel represented him throughout his trial and on his motion for a new trial, and also represent him on this appeal.

Being mindful of our duty under the automatic appeal statute, we have carefully considered all of the testimony, even though no lawful objection or exception was made [fol. 380] thereto, and find none seriously prejudicial to the rights of appellant; nor can we find, upon consideration of all the testimony, that the verdict is so decidedly contrary to the great weight of the evidence as to be wrong and unjust. See: Act No. 249, § 10, supra; Recompiled Code 1958, Tit. 15, § 382(10), supra. The verdict is amply supported by the evidence.

The evidence as to what happened on the occasion of the alleged rape was substantially as follows:

During the daytime on February 7, 1962, the complaining witness was at the home of her mother and father on the Millerville-Goodwater Highway in Talladega County.

She was alone except for her four months old sister for whom she was caring. She heard a knock on the front door, opened it, and found appellant there. Appellant asked if there was a man there and if he could use a phone. He told the witness he had had car trouble and wanted to use the telephone. The request was refused. Appellant then gave her a number to call. She made the call but found the telephone was not in service. The telephone rang, she closed the door, and answered the phone. At that time, she saw appellant still standing on the porch and went back to lock the door. She went back to the telephone and talked to her present husband, then laid the telephone down and went to tell appellant to leave, at which time she opened the door and appellant pushed his way into the house. She then ran to the back door where [fol. 381] appellant grabbed her and started choking her and told her he would kill her if she did not shut up. She started screaming. Appellant turned her loose and went back into the living room and put the telephone back on the hook. He then came back and stood against the door. He told the witness he was an ex-convict, or an escaped convict, and all he wanted was something to eat. She agreed to fix him something to eat if he would leave, but when she started to do so, he followed her to the kitchen and asked her to go into a bedroom with him. She refused several times. Appellant became angry. In the meantime, she had picked up the baby. She told appellant to turn off the heater, then started to run back into the living room and got out on the porch and off the porch into the front yard. She was running and fell, but got up and started to run again, leaving the baby lying on the ground. Appellant caught her. She was dressed at that time in a housecoat, pajamas, panties and brassiere. Her hair was rolled up on rollers and fastened with bobby pins. Appellant started pulling her back toward the house, first by her arms and then by her hair. He dragged her several feet by the hair back to where the baby was lying on the ground and told her to pick up the baby. He jerked the witness to her feet by the hair of her head. He then picked the baby up by her arm and again started pulling the witness back toward the house by her hair. When they got to [fol. 382] the porch she grabbed one of the posts and

wrapped her arms around it, at which time she was screaming. The post became loose from the bottom of the porch. She tried to grab another post but could not. She wrapped a leg around part of the door facing. He took her hands and pulled her by her legs into the house and dropped her on the floor. She picked up the baby and pulled herself up into a chair and again asked him to leave her alone and to leave the house. While they were in the yard, appellant struck her in the face with his hands. After she sat down in the chair he sat down on the arm of the chair, put his arm around her, and tried to make her kiss him. She resisted his advances, and he started hitting her again in the face and told her to take off her pajamas, which she refused, whereupon he ripped off the left leg of the pajamas. He then forced her into a bedroom, where he told her that he would shoot the baby between the eyes. He then put the witness on the bed, took off her panties, laid down on top of her, told her he would kill the baby, and proceeded to have sexual intercourse with her. When he finished, he pulled her into the kitchen and told her not to tell anybody what had happened. About that time she saw her younger brother returning from school and appellant left by the rear door of the house. Later in the evening, she saw appellant at the Talladega County jail and identified him as her assailant.

[fol. 383] The grounds of the motion to quash the indictment may be summarized as follows:

That Negroes are systematically excluded from the grand juries of Talladega County solely because of their race; that no member of such race, or a mere token number, are included on the jury roll or have their names placed in the jury box; that, if so placed, they are not drawn for service on any grand jury; that no Negro served on the grand jury which indicted appellant, "nor has any Negro served on a Talladega County, Alabama, grand jury in modern times; or if any Negroes have served on any of said grand juries, such service has only constituted a mere token number of eligible Negro male citizens"; that there exists in Talladega County a system, practice, or custom, in drawing or organizing grand juries, which is "designed to totally exclude Negroes from service on such grand juries or to discriminate against Negroes solely on account of their race or color"; that the 1960 Federal census shows that, at the

time the grand jury returned the indictment against appellant, the male population of Talladega County, twenty-one years of age and over, consisted of 12,125 whites and 4,281 Negroes; that the great majority of the Negroes possess all of the prescribed qualifications for selection and service as grand jurors; that, at the time of the indictment and at the present time, less than 5% of said Negro males were and are on the jury roll of said County; that "the method of selection of the names of Negroes to be placed on the [fol. 384] jury roll and in the jury box of Talladega County, Alabama, by the jury commission, is highly irregular and arbitrary and contrary to the method prescribed by the Constitution and laws of the State of Alabama and of the United States"; that "members of the Negro race are, solely because of their race or color, arbitrarily, intentionally and systematically excluded in the selection of persons for Grand Jury duty, in that the great majority of those qualified for service in Talladega County, Alabama, are not included on the jury roll, or if included on said roll, their names are left out of the jury box, or if put into the box and drawn, they are not listed for service, and because of the aforesaid practices, no Negroes, or only a mere token number have served on a Grand Jury in Talladega County, Alabama, since the days of Reconstruction, or certainly not in modern times"; and that the grand jury which returned the indictment against appellant "was organized according to and in keeping with the aforesaid practice."

The motion to quash the trial venire is based on substantially the same grounds as the motion to quash the indictment, with the following additional grounds:

"Members of the Negro race, otherwise qualified to serve have been systematically excluded from service on the aforesaid jury, or discriminated against in the organization of said jury, in that no member of the Negro race has been drawn for service thereon; or that a mere token number [fol. 385] have been drawn for service thereon; that there is no probability of them actually trying or participating in the trial of this, or any other case"; that "since the year of 1953, and before and continuing to this date, there has been a uniform practice by the jury board of Talladega County, Alabama, of discriminating against pro-

spective Negro jurors solely because of their race or color, either by leaving their names off the jury roll altogether or by including so few of their names in the jury box from which the venire is drawn, as to keep the number of Negroes actually summoned for jury duty at a token amount"; and that there exists a "system or practice in the drawing or organization of juries to serve in Talladega County, Alabama, deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries by either excluding them from the venire altogether or by keeping the number included so small that they can be systematically and uniformly struck from the venire and prevented from serving in the trial of any case"; that the trial venire drawn in this case "was selected in keeping with this practice," thereby depriving appellant "his rights as guaranteed by the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States of America."

The only points relied on by appellant for reversal are the overruling of his motions to quash. However, there are two other questions presented by the record which we [fol. 386] feel should be discussed. Code 1940, Tit. 15, § 389. These are whether evidence obtained by the state toxicologist from a physical examination of appellant was properly admitted in evidence, and whether a statement by the solicitor in his closing argument to the jury constituted a comment on appellant's failure to testify, contrary to Code 1940, Tit. 15, § 305.

Our conclusion is that reversible error is not made to appear, and that the judgment is due to be affirmed.

Motions to quash

The substance of the evidence on the motions to quash is as follows:

On the panel from which the grand jury was chosen, there were four or five Negroes. Two of these served on the grand jury which indicted appellant. Both the solicitor and the circuit clerk testified to this, and there was no contradiction of it. The solicitor, circuit clerk, an inferior court judge, and five attorneys from the county were witnesses at the hearing. The solicitor testified that he had

seen as many as three Negroes sitting on Talladega County grand juries several times; that he could remember only three or four grand juries since 1953 that had all white membership (there are normally four grand juries empaneled a year in Talladega County); that as many as 80% of the grand juries organized since 1953 have had Negroes serving on them; that in the summer of 1955, the panel from which the grand jury was selected was 23% Negro, [fol. 387] there being thirteen Negroes on it; that the jury panels usually contain from 10% to 12% Negroes; and that the panels normally consist of fifty to sixty persons. The testimony of the others in this group was substantially the same; that the usual number of Negroes on a grand jury venire is between four and ten; that none has ever seen a Negro sitting on a petit jury for the trial of a case but that the venire normally contains Negroes, but they are struck by the lawyers. It was stipulated that the trial jury venire of one hundred in this case included eight members of the Negro race. Other testimony at the hearing revealed that many Negroes who are qualified for jury duty either have been excused or are exempt from such duty under the provisions of Code 1940, Tit. 30, § 3, which exempts more than twenty occupational groups from jury duty.

The members of the jury commission testified that there has been no discrimination in placing names on the jury roll; that, in securing names to be placed on the roll, officers of plants employing both whites and Negroes have been contacted for the purpose of getting names of qualified jurors; that members of the commission have talked personally with various persons, including Negroes, for the purpose of obtaining names they would consider qualified to serve as jurors; that city directories, telephone books, church rolls, club rolls, and voting lists are used; also, that names are obtained from a Farmers' Co-operative, the [fol. 388] Farm Bureau, and the Rural Electrification Association, all of which have Negro members.

There was further testimony that, in compiling the jury roll, no distinction is made between white persons and Negroes; that the names are typed on the list alphabetically, with the occupation and address following the name; that plain white cards of the same size, texture and quality

are used for making up the cards to be placed in the jury box; and that it is often difficult or impossible to tell from an address whether the name is that of a white man or a Negro.

Called as witnesses for appellant were thirteen Negroes who had lived in Talladega for varying lengths of time ranging up to 72 years. Four of these testified that they had previously been summoned at least once for jury duty, although none had actually served on either a grand or petit jury. The name of one of them was on the jury roll. Three others were over the age of 65, thereby being exempt from jury duty, and another had been arrested twice, thus leaving his character open to question. None of the Negroes who testified was employed at the all-Negro Talladega College which is located in Talladega County.

It is apparent from the testimony that, although Negroes normally have been on trial venires, they have been struck in the process of selecting the trial jury.

The problem of racial discrimination in the selection of jurors is an old one and has been before the courts on [fol. 389] numerous occasions over the years. Certain principles have been formulated by these decisions which have application to this case.

It is well-settled that a defendant in a criminal case is denied the equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution, if he is indicted by a grand jury, or tried by a petit jury, from which members of his race have been excluded because of their race. *Neal v. Delaware*, 103 U.S. 370, 26 L. Ed. 567; *Rogers v. Alabama*, 192 U.S. 226, 24 S. Ct. 257, 48 L. Ed. 417; *Norris v. Alabama*, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Eubanks v. Louisiana*, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. 2d 991. Our cases are to the same effect. *Norris v. State*, 229 Ala. 226, 156 So. 556; *Millhouse v. State*, 232 Ala. 567, 168 So. 665; *Vaughn v. State*, 235 Ala. 80, 177 So. 553; *Vernon v. State*, 245 Ala. 633, 18 So. 2d 388; *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303, rev. on other grounds, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246; *Reeves v. State*, 264 Ala. 476, 88 So. 2d 561. "Excluded," in the context of the stated principle, means a systematic, purposeful non-inclusion based solely on race. *Cassell v. Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839. This is

not to imply that every grand and petit jury must contain members of the accused's own race. The accused has no right to have his race represented on the jury. *Akins v. Texas*, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Martin v. Texas*, 200 U.S. 316, 26 S. Ct. 338, 50 L. Ed. 497. Fairness in selection has never been held to require a proportional representation of races on a jury. In fact, a proportional limitation or representation, as such, is forbidden. *Cassell v. Texas*, *supra*; *Virginia v. Rives*, 100 U.S. 313, 25 L. Ed. 667; *United States ex rel. Goldsby v. Harpole*, (5th Cir.) 263 F. 2d 71, cert. den. 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78. It follows that the inclusion of a mere "token" number of persons of a certain race will not satisfy the constitutional requirements. *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469; *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84. A violation of these requirements can be accomplished either by state laws which are discriminatory on their face, or by employing "ingenious or ingenuous" devices in the administration of non-discriminatory laws so as to result in the proscribed discrimination. *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866; *Avery v. Georgia*; 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244; *Smith v. Texas*, *supra*.

The burden of proving discrimination is on the defendant. It is not to be presumed. *Akins v. Texas*, *supra*; *Norris v. Alabama*, *supra*; *Martin v. Texas*, *supra*; *Tarrance v. Florida*, 188 U.S. 519, 23 S. Ct. 402, 47 L. Ed. 572. However, once a defendant establishes a prima facie case of discrimination, the burden is then upon the state to refute it. *Reece v. Georgia*, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77; *Pierre v. Louisiana*, 306 U.S. 354, 59 S. Ct. 536, 83 L. [fol. 391] Ed. 757; *Hill v. Texas*, 316 U.S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559. A prima facie case may be established by showing an unexplained absence from grand or petit jury service for a long period of time (*Patton v. Mississippi*, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76; *Hill v. Texas*, *supra*), or by statements of the jury commissioners that they listed no Negroes on the jury rolls, or they knew of no eligible Negroes in an area composed of a large proportion of Negroes (*Cassell v. Texas*, *supra*; *Hill v. Texas*, *supra*), or where a "marking" system is used to differen-

tiate Negro names from white names on jury rolls or on cards used in the jury box. *Avery v. Georgia*, supra. Each case must, of course, be determined from its own particular facts, with due regard for the principles set forth in the cases. *Patton v. Mississippi*, supra.

Keeping these principles in mind, and examining the evidence presented at the hearing on appellant's motions, it is difficult to see wherein there was discrimination as alleged in the motions. In what way the Talladega County jury commission has discriminated in filling the jury box is not made to appear. There is not the slightest suggestion of any trickery or subterfuge in making up or marking the cards, or in the wording following the names on the jury roll and cards, or in the physical appearance of the cards, or in the manner of drawing the cards from the jury box in selecting jurors.

[fol. 392]. The general statutory provisions governing jury commissions, the preparation of jury rolls, the filling and refilling of jury boxes, and the drawing of juries, are embraced in Code 1940, Tit. 30, §§ 1-100. In addition, the Talladega County jury commission is regulated by Act No. 475, appvd. Sept. 9, 1955, Acts 1955, Vol. II, p. 1081. Under the provisions of Act No. 475, the jury commission is required to keep a roll containing the names of all male citizens living in the county who possess the qualifications prescribed by law and who are not exempted by law from serving on juries. Although the evidence indicates that all of the qualified persons in the county are not on the jury roll, still no evidence was presented that only Negroes have been left off. The means employed by the jury commission for acquiring names for the rolls simply were not exhaustive enough to insure the inclusion of all qualified persons, be they white or Negro.

Appellant alleges that if any Negroes have served on juries, they have been a mere "token" in number and that this is likewise prohibited by the Constitution. The census figures for Talladega County are cited in support of this contention. Such figures show that Negro males comprise 26% of the male citizenry of the County over the age of 21. The evidence established that from 10% to 23% of the members of the grand jury panels in the past several years have been Negroes. No evidence was presented by

[fol. 393] appellant showing the qualifications of the Negro community of Talladega County to serve on juries. As stated in *Fikes v. State*, *supra*:

*** It is not appropriate to say that they (Negroes) are entitled to be represented in the same proportion as the whites are represented unless their qualifications are in the same proportion. That does not appear. The comparison without that is not an accurate guide for a determination of the question.

In *Akins v. Texas*, *supra*, the United States Supreme Court had this to say:

*** A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination. *** [Emphasis supplied.]

In the case at bar, no evidence as to the educational level of the general Negro population was offered in support of appellant's position. As previously pointed out, inclusion of a "token" number of Negroes on the jury rolls does not satisfy the constitutional requirements. However, no case has come to our attention which prescribes a formula [fol. 394] for determining when "tokenism" ends and "fair" representation begins. The nature of the problem is one of degree and as such, must be dealt with on a case-by-case basis. From the evidence in this case, we see no basis for holding that the jury commission discriminated against the Negro race or followed a policy of "token" inclusion of members of that race. Cf. *Smith v. Texas*, *supra*. Our view is that appellant has not established a *prima facie* case in support of his motion to quash the indictment. See: 16A C.J.S., Constitutional Law, § 540, pp. 467-474.

As to the contention that Negroes are systematically excluded from trial juries, the evidence discloses that Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury. It has long been held that, where allowed by statute, peremptory chal-

[fol. 395] lenges may be used without any assigned or stated cause. *Pointer v. United States*, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208. Both the federal and Alabama jurisdictions have statutes providing for peremptory challenges. Code 1940, Tit. 30, § 53; 28 U.S.C. § 1870; Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C., pp. 3407, 3423. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights of due process and equal protection of the law. *Hall v. United States*, (D.C. Cir.) 168 F. 2d 161, 4 A.L.R. 2d 1193, cert. den. 334 U.S. 853, 92 L. Ed. 1775, 68 S. Ct. 1509, and reh. den. 335 U.S. 839, 93 L. Ed. 391, 69 S. Ct. 9; *United States v. Daniels*, (E.D. Pa.) 191 F. Supp. 129; *Watkins v. State*, 199 Ga. 81, 33 S.E. 2d 325; *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466; *State v. Logan*, 344 Mo. 351, 126 S.W. 2d 256. The following statement by the Michigan Supreme Court in the *Roxborough* case is particularly appropriate here:

"The reason counsel may have for exercising peremptory challenges is immaterial. This right has been granted by law, and it may be exercised in any manner deemed expedient, and such action does not violate any of the constitutional rights of an accused. If appell[fol. 396] iant's argument is carried to its logical conclusion, it would do away with the basic attribute of the peremptory challenge, because, if such argument is accepted in all cases involving defendants of the negro race, the prosecutor, upon challenging prospective jurors of that race, would either have to assign a cause for such challenge or take the risk of a new trial being granted on the ground that he discriminated because of color; as a result, no one could safely peremptorily challenge a juror where the defendant was of the same race as the juror. * * * *

In *Hall v. United States*, supra, it was held that the fourteenth Amendment was wholly inapplicable to this type situation. In that case the government struck nineteen Negroes from the jury panel and the Negro defendants contended that their constitutional right thereby had been violated. The court said:

" * * * The requirements of due process were met when there was no racial discrimination in the selection of the veniremen. The government as a litigant was entitled to exercise twenty peremptory challenges, [fol. 397] which means that its counsel could exclude from the jury that number of persons without assigning, or indeed without having, any reason for doing so. The Constitution does not require that the appellants, being Negroes, should be tried by a jury composed of or including members of that race. They legitimately sought to obtain the fancied advantage of having Negroes on the jury by using their peremptory challenges only against white members of the panel."

See: 4 A.L.R. 2d 1200, Anno., "Use of peremptory challenge to exclude from jury persons belonging to a race or class."

State toxicologist's testimony

At the time the warrant was served on defendant, he was informed he had the right to call an attorney, and to make any statement he wished, or not to make any statement. He was further told that any statement or anything he said or did could be used in court against him. There is no indication that he requested or wanted to see an attorney or anyone else.

After defendant was charged, the sheriff called a state toxicologist, who examined defendant at the Talladega County jail that evening. On his voir dire examination, [fol. 398] the toxicologist testified that he introduced himself to defendant and told him of his official capacity; that he asked defendant if he had been mistreated in any way, to which he received a negative reply; that he explained to defendant what he wanted him to do and what he proposed to do; that he told defendant it was not necessary for him to comply in any way; that he proposed to make an examination of him and would testify in court as to what he found; whether it be favorable to defendant or against him; that if his findings were in favor of defendant, he would testify that way, and if against him, he would testify that way; that he asked defendant if he understood what he was trying to tell him, if he understood the seriousness of the charge, and if he wished to go ahead with the exami-

nation, to which defendant answered that he did; that he asked defendant if he had a lawyer, to which he replied that he did not; that defendant did not object to the examination and, in fact, told the toxicologist that he wished to go ahead with it.

The toxicologist testified that he told defendant he wanted him to stand on a piece of paper and take his clothes off and that he planned to make photographs of him; that he wanted defendant to drop his clothes onto the paper as he took them off; that, after he got through disrobing, he wanted him to initial and identify each of the items of clothing; that he wanted to examine defendant's private organs for the purpose of making a smear to determine [fol. 399] whether there was evidence of semen present; that the only objection made by defendant to this procedure was that he did not want any of the photographs of him in the nude made available for general distribution; that he was assured the pictures would be only for court purposes.

The toxicologist then took a clean newspaper and laid it on the floor and had defendant stand on it. He then asked defendant to drop his clothes on another piece of paper as he took them off. Defendant initialed each item of clothing at that time.

Defendant was told that the reason for taking the pictures was to determine whether he had been injured or abused in any way. The toxicologist specifically asked defendant if he had been mistreated, to which he replied he had not. The toxicologist further testified that his physical examination of defendant did not show any significant abrasions, marks, bruises, or swelling on defendant's person.

The toxicologist asked defendant to brush his pubic hair onto the paper and later made a microscopic examination of the hairs which fell on the paper and concluded some were from the body of a Negro and some from the body of a white person.

At the trial, appellant objected to the admission in evidence of the results of the toxicologist's examination, contending that his constitutional rights had been violated [fol. 400] in that he was compelled to give incriminating

evidence against himself in violation of the United States and Alabama Constitutions.

Where action taken by an accused is voluntary, there is no compulsion and the defense of self-incrimination with respect thereto is not available. *Myhand v. State*, 259 Ala. 415, 420, 66 So. 2d 544; *United States v. Wheeler*, (3rd Cir.) 275 F.2d 94. The principle is thus stated in 22A. C.J.S., Criminal Law, § 651, p. 548:

"Generally, the constitutional guaranty against self-incrimination does not preclude the admission of real evidence produced by a reasonable examination of the body of accused; and the admission in evidence of the findings of experts on a physical or mental examination of the accused does not ordinarily violate his privilege, at least where the examination is had without any compulsion."

From 14 Am. Jur., Criminal Law, § 160, 1963 Cum. Supp., p. 180, p. 755, is the following:

" * * * It is well settled that the constitutional provision forbidding compulsory self-incrimination is not violated by a voluntary physical examination of a defendant in a criminal case and that testimony based [fol. 401] on a voluntary examination is not excluded by such provision."

See the following annotations on this point: 164 A.L.R. 967, at p. 976; 25 A.L.R. 2d 1407, at pp. 1413-1415.

The case of *Myhand v. State*, 259 Ala. 415, 420, 66 So. 2d 544, supra, is directly in point on the question of admissibility of the evidence derived from the toxicologist's examination of appellant. The defendant in that case was a Negro, charged with raping a white girl. After his arrest, he submitted to an examination similar to the one conducted in the case at bar. He was asked to remove his clothing; so that it might be used in evidence, and he consented to the toxicologist conducting a "snear" test similar to the one conducted in the case before us. It was held that, since the defendant had voluntarily submitted to these

actions, there was no merit to defendant's claim of self-incrimination. As there said:

"We cannot agree with the position taken by counsel for appellant for two reasons; first, the evidence as it bears on the taking of the 'smears' fully supports the finding that appellant was not forced or coerced to permit the smears to be made. It appears from his own testimony that he was perfectly willing to submit [fol. 402] to the tests. The evidence supports a finding that appellant was not compelled or induced to submit to the tests by threats or promises and the mere fact that the tests were made in the presence of officers of the law does not, in our opinion, conclusively show that appellant did not voluntarily permit the tests to be made. See *Potter v. State*, 92 Ala. 37, 9 So. 402."

The evidence in this case leads to a similar conclusion. There is nothing in the record to indicate that appellant was coerced in any manner in removing his clothing or in submitting to the examination by the toxicologist. As noted above, appellant already had been informed of his right to call an attorney.

Appellant further contended that the presence of the sheriff at the time he was requested by the toxicologist to submit to the examination constituted duress, the result being that the consent to the examination was actually coerced, and, therefore, ineffective. This argument was advanced in *McManus v. Commonwealth*, 264 Ky. 240, 94 S.W. 2d 609, but the court was not receptive to the contention, saying: "The mere fact that officers were present is insufficient to raise the presumption of duress." To the same effect are *Myhand v. State*, 259 Ala. 415, 420-421, [fol. 403] 66 So. 2d 544, supra, and *Phillips v. State*, 248 Ala. 510, 519, 28 So. 2d 542, and cases there cited.

Whether such evidence would have been admissible if appellant had been under duress, we do not decide. We are of the opinion the evidence establishes that appellant voluntarily submitted to the examination and that the evidence derived from such examination was admitted without error.

Argument of solicitor

During his summation to the jury, the solicitor made this statement: "Gentlemen, do you think we have proved those three elements? I submit to you that it is not denied, there is not a word come from this stand that denied the charge of rape. We have proved it to you, gentlemen, beyond a reasonable doubt that this prosecuting witness was raped. Now the only question that the defendant has raised here by his attorneys is the question of identity."

Appellant objected to this argument, and moved for a mistrial, on the ground that it "was with reference to the fact that the defense offered no testimony." The objection and motion were overruled and appellant excepted.

Code 1940, Tit. 15, § 305, as amended by Act No. 124, app'd. June 23, 1949, Acts 1949, p. 150, provides as follows:

"On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; [fol. 404] and his failure to make such a request shall not create any presumption against him, nor be the subject of comment by counsel. If the solicitor or other prosecuting attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within thirty days from entry of the judgment."

The statute does not prohibit a prosecutor from drawing reasonable inferences from the evidence presented in a case, and statements to the effect that the evidence is uncontradicted or undenied are not prohibited by the statute. See: *Welch v. State*, 263 Ala. 57, 58, 81 So. 2d 901; *Thompson v. State*, 41 Ala. App. 353, 357-358, 132 So. 2d 386; *Dixon v. State*, 39 Ala. App. 575, 105 So. 2d 354; *Littlefield v. State*, 36 Ala. App. 507, 63 So. 2d 565, cert. den. 258 Ala. 532, 63 So. 2d 573; *Dickey v. State*, 21 Ala. App. 644, 111 So. 426. In *Welch v. State*, supra, the following was approved as a correct statement of the law:

"It is generally held that a statement by the prosecuting attorney to the effect that the evidence for the

State is uncontradicted or undenied is not a comment, on the defendant's failure to testify."

[fol. 405] We hold that the solicitor's argument was not violative of § 305, Tit. 15, as amended, supra.

We have carefully review the entire record, as required by Code 1940, Tit. 15, § 389, supra, and find no reversible error.

The judgment is due to be, and is, affirmed.

Affirmed.

Livingston, C. J., Simpson, Merrill, Coleman and Harwood, JJ., concur.

[fol. 406]. IN THE SUPREME COURT OF ALABAMA

The Court Met in Special Session Pursuant to Adjournment

Present: All the Justices

7th Div. No. 581

Talladega Circuit Court, No. 6134

(Death)

ROBERT SWAIN,

vs.

THE STATE OF ALABAMA

JUDGMENT—September 5, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is Therefore Considered, Ordered, Adjudged and Decreed that the judgment of conviction and sentence of the Circuit Court be and is hereby in all things affirmed.

It is Now Ordered that Friday, December 6, 1963, be and is hereby fixed as the date for the execution of the defendant, Robert Swain.

It is Further Ordered that the Sheriff of Talladega County, Alabama, deliver the said defendant to the Warden of Kilby Prison at Montgomery, in Montgomery County, Alabama, and that said Warden execute the judgment and sentence of the law on Friday, December 6, 1963, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the said Robert Swain, until he is dead, and in so doing he will follow the rules prescribed by the statutes.

It is Also Ordered that the appellant, Robert Swain, pay the costs of appeal of this Court and of the Circuit Court, for which costs let execution issue.

[fol. 407] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

Seventh Division No. 581

Ex Parte: ROBERT SWAIN

[Title omitted]

APPLICATION FOR RE-HEARING—Filed September 20, 1963

Now comes petitioner, in the above-styled cause, and respectfully moves this Honorable Court to grant to him a Re-hearing in said cause, and reverse, revise, and hold for naught its judgment rendered on to-wit, the 5th day of September, 1963, affirming the decision of the Circuit Court of Talladega County, Alabama, wherein after a trial by a jury, the defendant was found guilty of rape and sentenced to death by electrocution.

Appellant further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Re-hearing.

Submitted herewith is a Brief and Argument in support of said Motion.

/s/ Orzell Billingsley, Jr., /s/ 1630 Fourth Avenue, North, Birmingham, Alabama, Attorneys for Appellant.

I hereby certify that I have served a copy of the foregoing Application for Re-hearing upon the Honorable Richmond Flowers, Attorney General of the State of Alabama, on this 18th day of September, 1963.

/s/ Orzell Billingsley, Jr., Attorney for Appellant.

[fol. 408] IN THE SUPREME COURT OF ALABAMA

The Court Met in Special Session Pursuant to Adjournment

Present: All the Justices

7th Div. 581

ROBERT SWAIN,

v.

STATE OF ALABAMA.

Talladega Circuit Court

(Death)

ORDER OVERRULING APPLICATION FOR REHEARING—September 26, 1963

It is Ordered that the application for rehearing filed in this cause on September 20, 1963, be, and the same is hereby overruled.

[fol. 409] Clerk's certificate to foregoing transcript (omitted in printing.)

[fol. 410]. SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1963

No.

ROBERT SWAIN, Petitioner,

vs.

ALABAMA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 19, 1963

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 22, 1964.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of December, 1963.

[fol. 411] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1963

No. 1093 Misc.

ROBERT SWAIN, Petitioner,

vs.

ALABAMA.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 27, 1964.

On petition for writ of Certiorari to the Supreme Court of the State of Alabama.

On consideration of the motion for leave to proceed

herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1051 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED

AUG. 24 1964

IN THE JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1964
No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama (R. 219) is reported at 275 Ala. 508, 156 So. 2d 368.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on September 5, 1963 (R. 236) and application for rehearing was overruled on September 26, 1963 (R. 238). On December 19, 1963, Mr. Justice Douglas extended the time for filing petition for writ of certiorari to and including February 22, 1964 (R. 239). The petition was filed February 22, 1964 and granted April 27, 1964 (R. 239).

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether petitioner was denied due process of law and the equal protection of the laws in violation of the Fourteenth Amendment when indicted, convicted and sentenced by grand and petit juries in a county where

- A) The State always strikes the token number of Negroes on the trial venires, with the result that Negroes never serve on trial juries, and
- B) Negroes have been summoned for jury service in only token numbers, and the state has offered no explanation for the small proportion called.

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes which are set forth in the appendix:

- 18 U. S. C. §243.
- Ala. Const., Art. I, §6.
- Ala. Code, tit. 30, §3.
- Ala. Code, tit. 30, §10.
- Ala. Code, tit. 30, §12.
- Ala. Code, tit. 30, §18.
- Ala. Code, tit. 30, §20.
- Ala. Code, tit. 30, §21.
- Ala. Code, tit. 30, §24.
- Ala. Code, tit. 30, §52.
- Ala. Code, tit. 30, §58.
- Ala. Code, tit. 30, §60.

Ala. Code, tit. 30, §64.

Ala. Code, tit. 30, §89.

Acts of Ala., Special Regular Session of 1955, Act No. 475, vol. 2, p. 1081.

Statement

The petitioner, a Negro, was indicted for rape (R. 2) and convicted in the Circuit Court of Talladega County, Alabama.¹ The jury fixed his punishment at death by electrocution (R. 213, 214). At the hearing conducted before trial on petitioner's motion to quash the indictment (R. 3), the following matters were brought out with respect to the selection of grand and petit juries.

Census Figures

The Circuit Court judicially noticed that according to the United States Census of 1960 the total population of Talladega County was 65,495. The white population was 44,425 or 68 per cent, and the nonwhite population was 20,970 or 32 per cent. The total male population over 21 was 16,406, including 12,125 whites (74 per cent) and 4,281 nonwhites (26 per cent) (R. 71).

Compilation of the Jury Roll

In Talladega County, the jury box from which grand and petit jury panels are drawn is filled every two years (R. 91) by three Jury Commissioners who are appointed by the Governor² and paid a nominal amount.³ Each of the Commissioners in 1961 was self-employed (R. 50, 86, 109) and

¹ The evidence presented at trial is summarized in the opinion of the Supreme Court of Alabama (R. 220-22).

² Ala. Code, tit. 30, §10 (1958).

³ Ala. Code, tit. 30, §12 (1958).

performed his duties in his spare time or in conjunction with his work. The Commissioners are assisted by a clerk who is regularly employed as a Chief Deputy Circuit Clerk (R. 74).

The Jury Commission meets twice yearly (R. 69, 100). Each Commissioner presents a list of names for approval by the Commission (R. 87-88, 111). The clerk then types a card for each person approved, listing his name, address, and occupation (R. 63, 74, 177). The clerk also has on file similar cards for persons who have served on previous juries (R. 68-69). These cards, except for persons who have become exempt or have been called for jury service within the past two years (R. 91, 92), are placed with the cards made from lists presented by the Commission and are arranged in alphabetical order according to political district, or "beat" (R. 73, 177). Once every two years, the jury roll is typed up from the cards of eligible jurors, and the cards are placed in the jury box, which is first emptied (R. 174). All grand and petit jurors for the next two years are drawn from this box.

Those eligible for jury service are males aged 21 or over "who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment . . ."⁴ Habitual drunkards, disabled persons, those convicted of offenses "involving moral turpitude," and illiterates who are not freeholders or householders are disqualified.⁵ Persons over 65⁶ and

⁴ The procedures described above correspond substantially with the requirements of Alabama's general statute, see Ala. Code, tit. 30, §20 (1958) and the special statute governing Talladega County, see Acts of Alabama, Special Regular Session of 1955, Act No. 475, vol. 2, p. 1081 (*infra Appendix*).

⁵ Ala. Code, tit. 30, §21 (1958).

⁶ *Ibid.*

⁷ *Ibid.*

those engaged in certain occupations⁸ may choose not to serve.

The Jury Commissioners in Talladega County make no attempt to place the names of all eligible jurors on the roll (R. 89, 117).⁹ Of the 16,406 males over 21 in the County (R. 71), approximately 2500 (R. 68, 91, 177) are on the current jury roll. The Commissioners divide the County three ways, and each gathers names in his designated area (R. 106).

The Chairman of the Jury Commission testified that he obtained names of prospective jurors by going out "into the community with a list of names or roll" and checking on them (R. 52). He did not canvass from house to house but asked persons he knew in each area for suggestions (R. 106). However, he did not call on Negroes (R. 54) and his association with Negroes was generally restricted to customers in his paint store (R. 54), of whom there were "a few" Negroes (R. 102).

The Chairman testified that he had placed some Negroes on the roll (R. 58) and had talked with "just plenty of them" about the qualifications of certain persons, but could not name a single Negro on the jury roll without examining it (R. 62). The Chairman underestimated the County's Negro population stating that in his best judgment Negroes comprised 10 per cent of the population (R. 105).

A second Jury Commissioner testified that the jury roll did not include all the qualified male citizens in the County because it "would be almost impossible to get all" (R. 89). He stated that he used "the same method" for selecting

⁸ Ala. Code, tit. 30, §3 (1958).

⁹ But both the general and special statutes require that the names of all eligible persons be placed on the jury roll. See Ala. Code, tit. 30, §20 (1958); Acts of Alabama, Special Regular Session of 1955, Act No. 475, vol. 2, p. 1081.

whites as he did Negroes (R. 92), and that whether an individual met the statutory qualifications was a matter of opinion (R. 90).

He compiled lists of qualified persons by working through clubs and "different people in the community and . . . lists that they recommended" (R. 87); however, he later testified he did not go to clubs (R. 96). For Talladega City, he used the City Directory (R. 87). He also called on people in their homes and businesses and had "personal knowledge" of qualified persons (R. 90). In addition, he used REA and Farm Bureau lists (R. 93-94) and testified the Farm Bureau list contained names of whites and Negroes (R. 94). However, he subsequently stated he did not know if any Negroes were members of the Farm Bureau (R. 94). Although he was "well acquainted" with both whites and Negroes in the northern end of the County, he found it "impossible" to state in either absolute or relative terms how many Negroes he knew (R. 97).

A third Jury Commissioner testified that in securing names of qualified persons he did not "watch the color line" (R. 116). He said that the Jury Commission had not conducted a survey of the County to obtain the names of qualified persons (R. 117), and that he did not "really canvass the community" (R. 114), but went to "some leading citizen out there or some merchant that knows the people" to obtain names of qualified persons (R. 112). He also testified that the leading citizens were both white and Negro, but he could not recall any one by name (R. 112, 113). Although he claimed that he had placed a few of his Negro customers on the jury roll, he could not identify the name of one Negro customer (R. 113) or any Negro (R. 116) on the roll.

The Clerk of the Jury Commission testified that she did not go out into the County to check on the qualifications of

prospective jurors (R. 64), but she did supply names of prospective jurors to the Commission members "merely as a help" (R. 64). She compiled lists of names by using church rolls, civic club rolls, poll lists, the city directory, and the telephone directory (R. 64-65). She also contacted the managers of various plants requesting them to send her lists of names (R. 66) and she requested names from some Negroes (R. 71). She also stated that she did not solicit the use of any Negro church rolls nor did she request names from any Negro clubs (R. 66). As far as she knew, Negroes did not own any plants and all the plant managers were white (R. 66). She admitted that her acquaintance was "more or less confine[d] to the whites of Talladega" (R. 72).

Composition of Venires and Juries

Three or four grand juries are organized each year (R. 9). The grand jury venire of 50 or 60 names is drawn from the jury box by the Circuit Judge in open court (R. 11, 12, 16). These persons are summoned and approximately 35 qualified jurors without excuses appear in court (R. 11, 12, 19). Of these 35, 18 names are drawn from a hat for service on the grand jury (R. 8, 36).

The usual representation of Negroes on a grand jury venire is 10, 12, or 15 per cent (R. 10), as estimated by the Solicitor who was present during the empaneling of all grand juries since 1953 (R. 8). One or more Negroes served on 80 per cent of the grand juries drawn between 1953 and 1962 (R. 21), but no more than three Negroes ever served (R. 9, 36). In petitioner's case four or five Negroes were on the grand jury venire of 33 names and two Negroes served (R. 8, 125-26).

The petit jury venire is drawn from the jury box during the week prior to trial (R. 16). The number of names

drawn varies between 75 and 100, with large venires of 90 to 100 drawn for capital cases (R. 17, 41, 202). Approximately 10 to 15 per cent of this group fail to appear; in capital cases a rough average of 75 do appear (R. 17, 41). Some of those who appear are excused for various reasons, including challenges for cause (R. 17-18, 20). The jury is then struck from those who remain (R. 20). Alternating turns, the prosecutor strikes one name and the defense strikes two until only 12 persons remain (R. 20).¹⁰

The Solicitor estimated that 10 or 12 or 15 per cent of the persons on the petit jury venire are Negroes (R. 10). He has seen as few as four per cent and as many as 23 per cent (R. 10, 19).¹¹ He stated that the usual number of Negroes present when the striking begins is seven or eight (R. 18). The Circuit Clerk said that the number of Negroes on the venire was "usually two or three or six or seven. One time it was eleven" (R. 126). One witness said he saw seven or eight Negroes on a venire of 50 or 60 persons (R. 160), and another testified that there were usually six or seven Negroes on a petit jury venire of 35 to 40 persons (R. 40). A judge of the Intermediate Court testified that he had seen no more than six or seven Negroes on a venire, but as few as two (R. 44).

In this case, there were eight Negroes on the petit jury venire list of 100 (R. 202). Six of them were available for service but were stricken by the State (R. 202, 205, 229).

All who testified stated that no Negro had ever served on a petit jury of either a criminal or civil case in Talladega

¹⁰ Ala. Code, tit. 30, §§60, 64 (1958).

¹¹ The occasion when 23 per cent were Negroes was a case prior to 1955 in which a Negro defendant accused of killing a Negro was offered an all-Negro jury. Thirteen Negroes were on the petit jury venire and the prosecution offered to allow him to strike any one and use the others as the jury. The offer was declined (R. 10, 19, 23).

County. This included the Circuit Solicitor (R. 13, 14, 21), five attorneys (R. 29, 35, 39, 40, 46), an Intermediate Court Judge (R. 44), the Chief Deputy Circuit Clerk (R. 76), the Chairman of the Jury Commission (R. 58), eight Negro witnesses (R. 130, 136, 150, 153, 156, 161, 165, 166) and the Circuit Clerk who had held his office for sixteen years (R. 124). The State did not contest the fact that no Negro had ever served on a petit jury (R. 183).

The Circuit Solicitor testified that the striking of a jury is done differently depending upon whether or not the defendant was of the same race as the victim of the alleged crime (R. 20). He stated that on numerous occasions he has asked defendants whether they desired to have Negroes serve; if they did not, and if he "did not see fit to use them, then we would take off. We would strike them first or take them off" (R. 20, 27). If the defendant wanted Negroes to serve, the Solicitor's response "would depend on the circumstances . . . and what I thought justice demanded and what it was in that particular case" (R. 27). In one case in which a Negro defendant was charged with the murder of another Negro, the Solicitor offered to use an all-Negro jury, but the offer was declined (R. 21, 26). The Supreme Court of Alabama found that "the evidence discloses that Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury" (R. 229).

State's Evidence

The State called two witnesses. The first was the Secretary of the Talladega Health Department and Registrar of Vital Statistics. She testified that of the 214 illegitimate babies born in the county in 1961, 201 were Negro (R. 186-87); she also stated that of the 12 new cases of syphilis in the county in 1961, 11 were Negro (R. 188); and of the 26 new cases of gonorrhea in 1961, 19 were Negro (R. 190).

The second witness for the State was the Director of the Department of Pensions and Securities in Talladega

County. She testified that as of April 30, 1962, there were 3,316 male and female recipients of public assistance, of whom 44.6 per cent were Negro (R. 193-94). She stated that 2,205 of the recipients were "old pensioners" (R. 194), 43 were blind persons, 695 were families receiving aid to dependent children, 30 were neglected children and 342 were totally disabled persons (R. 196). It was also brought out that possession of a "homestead" or \$3000 worth of property did not disqualify a person from receiving assistance (R. 195).

Summary of Argument

A. Negroes are consistently struck from trial jury panels by the prosecutor. Such racial exclusion by a representative of the state violates the Fourteenth Amendment, which prohibits systematic exclusion from jury service regardless of the manner in which it is accomplished. There is no justification for concluding that prohibition of racial strikes by the prosecutor would interfere with the usefulness of the peremptory challenge. No state can subvert the constitutional and statutory policy against racial discrimination or ensure that juries will be unrepresentative of the community. The challenges of the state have never been considered absolute and, in fact, were conceived to assist in the selection of an impartial jury, an end which the state's use of challenges makes impossible to achieve. Finally, the state has not even used its strikes for an end legitimately related to the litigation, but habitually strikes Negroes because they are Negroes and for no other reason.

B. Although Negroes comprise 26 per cent of the eligible jurors, they play only a token role in the jury system of Talladega County. No Negro has ever served on a criminal or civil jury in the county. Haphazard procedures

followed by the Jury Commissioners, some in violation of state statute, favor selection of whites. The state recognized its duty to explain the relatively small number of Negroes on the venires but produced only irrelevant statistics and did not meet its burden of proof under the Fourteenth Amendment. The holding of the Supreme Court of Alabama that petitioner must establish affirmatively that Negroes are as qualified as whites in order to make out a successful showing of exclusion conflicts with numerous decisions of this Court.

ARGUMENT

Negroes Have Been Excluded From Jury Service in Talladega County in Violation of Petitioner's Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

A. Negroes Are Unconstitutionally Excluded From Jury Service in That the State Always Strikes the Token Number of Negroes on the Trial Venires With the Result That Negroes Never Serve on Trial Juries.

Negroes have been placed on the jury venires of Talladega County in such token numbers that they may be "always struck by attorneys in selecting the trial jury" (R. 229). Using the strikes authorized by Ala. Code, tit. 30, §§60, 64 (1958), the Solicitor strikes one juror and the defendant strikes two from trial jury venires in all criminal cases (if there are two or more defendants, each has one strike) until there are only twelve jurors remaining. These twelve constitute the trial jury. No Negro has ever served on a trial jury in a criminal or civil case in the county, and all the Negroes on petitioner's jury venire were struck, because the Solicitor invariably exercises his strikes to remove Negroes summoned for jury service.

The state has, therefore, excluded Negroes contrary to the "unbroken line of cases" in which this Court has held a criminal defendant's Fourteenth Amendment rights violated "if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race" *Eubanks v. Louisiana*, 356 U. S. 584, 595. For the rule is not qualified by the form or the perpetrator of the exclusion, *id.* at 356 U. S. 587. The Constitution is violated "*by any action* of a state, whether through its legislature, through its courts, or through its executive or administrative officers," which results in exclusion of Negroes "*from serving*" on juries. *Carter v. Texas*, 177 U. S. 442, 447 (emphasis supplied); *Norris v. Alabama*, 294 U. S. 587, 589. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand" *Smith v. Texas*, 311 U. S. 128, 132.

Despite these principles and the intentional, systematic exclusion of Negroes from trial jury service because of race by a public official (accountable for his conduct under the Fourteenth Amendment, see, e.g., *Napue v. Illinois*, 360 U. S. 204; *Hamilton v. Alabama*, 376 U. S. 650),¹² the Supreme Court of Alabama approved the practice of the Circuit Solicitor of always striking Negroes. The court, adopting language from a Michigan case, *People v. Roxborough*, 307 Mich. 575, 12 N. W. 2d 446 (1943), held that the utility of peremptory strikes would be impaired if any limitation were placed on the state's challenge to prospective jurors (R. 230):

¹² Cf. *Berger v. United States*, 295 U. S. 78, 89, where this Court reversed on the ground that "the misconduct of the prosecuting attorney . . . was pronounced and persistent; with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

"The reason counsel may have for exercising peremptory challenges is immaterial. The right has been granted by law and it may be exercised in any manner deemed expedient and such action does not violate any of the constitutional rights of an accused. It would do away with the basic attribute of the peremptory challenge because if such argument is accepted in all cases involving defendants of the Negro race, the prosecutor, upon challenging prospective jurors of that race, would either have to assign a cause for such challenge or take the risk of a new trial being granted on the ground that he discriminated because of color; as a result no one could safely peremptorily challenge a juror where the defendant was of the same race as the juror. . . ."

There is no reason to believe, however, that a prosecuting attorney, upon challenging prospective Negro jurors, would "have to assign a cause for such challenge" (R. 230) or be highly subject to reversal "on the ground that he discriminated because of color" (R. 230). It is one thing for a prosecutor to strike a Negro because he does not desire him as an individual to serve on a particular trial jury or juries, and quite another for an official of the state, as here, to strike all Negroes from trial juries pursuant to a notorious practice of always excluding Negroes regardless of the character of the individual or the case. The Jury Commission of Talladega County may not exclude Negroes from jury service, but the Commission does not "assign a cause" for failing to place Negroes on the jury rolls. No prosecutor who does not engage in a systematic policy of striking jurors on account of race need fear reversal for striking the Negroes on particular panels. A prosecuting attorney will always be in a position to adduce proof that Negroes are not systematically struck without great difficulty. Cf. *Pierre v. Louisiana*, 306 U. S. 354, 361, 362. Such proof

would, of course, refute any "logical inference to be drawn," *Hernandez v. Texas*, 347 U. S. 475, 480, from evidence of a prosecutor's conduct in any one case in the same manner as it would with respect to a Jury Commission. *Ibid.* See *Norris v. Alabama*, 294 U. S. 587, 590-92, 598-99. The fears of the Supreme Court of Alabama that "no one could safely peremptorily challenge a juror where the defendant was of the same race as the juror" (R. 230) are unfounded.

But whatever the risks of prohibiting racial strikes, they are preferable to permitting a high public official¹³ to undermine the constitutional requirement that no distinct group be excluded from jury service.¹⁴ Use of peremptory strikes by public officials is a common method of insuring exclusion of Negroes from jury service (1961 Commission on Civil Rights Report, Vol. 5, pp. 93, 99) which reduces the practical effect of the Fourteenth Amendment and 18 U. S. C. §243,¹⁵ and principles enunciated by decisions of

¹³ The injury to constitutional administration of criminal justice is all the greater when the racial policy attacked is injected into the criminal process by an officer of the court with duties and responsibilities to the public. See, e.g., Canon 5, Canons of Professional Ethics of the American Bar Association. The Circuit Solicitor is the official in Alabama who supervises the proceedings of grand juries, draws up indictments, and prosecutes indictable offenses. Code of Ala. tit. 13, §229 (1958). Solicitors devote their entire time to the discharge of the duties of the office and are prohibited from practicing law in any other manner. *Ibid.*

¹⁴ It is clear that, in Alabama, the Solicitor actively participates in the process of selecting the trial jury. Ala. Code tit. 30, §§60, 64 (1958). The prosecutor is responsible for striking a large number of jurors whether or not he has any objection to them, for he is required to strike down to the number of 12 regardless of whether he objects to the jurors remaining on the venire.

¹⁵ Exclusion from jury service on account of race has been prohibited by federal statute since the Civil Rights Act of 1875. 18 U. S. C. §243 (formerly 8 U. S. C. §44) is written in broad terms which certainly apply to exclusion by use of strikes, see *Fay v. New York*, 332 U. S. 261, 282-4.

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for jury service as

this Court, to the ritual of placing Negroes on a venire without any possibility of actual jury service. "The rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury" (Edgerton, J., dissenting). *Hall v. United States*, 168 F. 2d 161, 166 (D. C. Cir. 1948), cert. denied 334 U. S. 853.¹⁶

The Supreme Court of Alabama (R. 230) and the State, in its Brief in Opposition to Certiorari, take the position that the right to strike granted by Ala. Code, tit. 30, §§60, 64 (1958) is absolute and may, therefore, be employed by a prosecutor to exclude Negroes from jury service on account of race. This conclusion is at war with the history of

grand or petit juror in any court of the United States, or of any state on account of race, color, or previous condition of servitude; and whoever being an officer or other person charged with any duty in the selection or summoning of jurors excludes or fails to summon any citizen for such cause shall be fined not more than \$5,000.

¹⁶ In *Hall v. United States*, 168 F. 2d 161 (D. C. Cir. 1948) cert. denied 334 U. S. 853, Negro defendants objected to the Government's peremptory challenge of all nineteen Negro members of the panel. There was no express finding that Negroes had been struck on account of race, no claim of systematic exclusion of Negroes from the venire, and no evidence of a practice of regularly striking Negroes from jury panels so that they would never serve. The court in *Hall*, 168 F. 2d at p. 164, found:

The due process clause of the Fifth Amendment would be invokable if the authorities charged with the duty of selecting jurors had systematically excluded Negroes from the panel. The requirements of due process were met when there was no racial discrimination in the selection of the veniremen. The government . . . was entitled to exercise twenty peremptory challenges . . . without assigning, or indeed without having any reason for doing so.

Judge Edgerton, dissenting, disagreed with the majority in that he found the government "impliedly admits", 168 F. 2d at 166, that Negroes were systematically excluded from the trial jury by use of strikes and concluded that the use of peremptory challenges violated a federal statute as well as the due-process clause of the Fifth Amendment.

the peremptory strike and the values which have been given content by the constitutional prohibition against exclusion. The grant of peremptory challenges to the *State*, for example, has always been subject to restriction "by the necessity of having an impartial jury" and "the constitutional right of the accused" under the Fourteenth Amendment. *Hayes v. Missouri*, 120 U. S. 580. In England, the right of peremptory challenge in the Crown was abolished by statute in 1305, 33 Edward I, Statute 4, only to be reintroduced, on a modified basis, by rule of court. *Hayes v. Missouri*, *supra*.

The conduct of the Solicitor, approved by the Supreme Court of Alabama, alters the fundamental character of the jury system by ensuring that all trial juries are unrepresentative of a cross-section of the community. So long as the State is totally unrestricted in its use of strikes, no minority is safe from complete exclusion from actual jury service. But juries unrepresentative of the community distort "basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U. S. 128, 130; *Thiel v. Southern P. Co.*, 328 U. S. 217, 220; *Ballard v. United States*, 329 U. S. 187, 195.

Strauder v. West Virginia, 100 U. S. 303, recognized that exclusion of Negroes from juries "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others" (100 U. S. at 308). Cf. *Hamilton v. Alabama*, 376 U. S. 650. By striking all Negroes as a matter of course, the Solicitor places the authority of the State and his office¹⁷ behind racial

¹⁷ The Alabama Court of Appeals has often described the duties and responsibilities of the Circuit Solicitor as follows:

The office of Solicitor is of the highest importance; he is the representative of the State and as a result of the important

prejudice in the presence of the tribunal which determines the guilt of and—in the case of petitioner—sentences a Negro defendant.

The Solicitor indicated that he frequently asks defendants whether or not they want Negroes on the jury, and if not, the prosecutor and defense attorney "take them off" or "strike them first" (R. 20, 27). This evidence establishes that Negroes are set apart; treated differently; and by this pattern of treatment affixed with a brand of inferiority.

A petit jury is duty bound to find the facts and apply the law in an impartial manner. Ala. Const., Art. I, §6 (1901); Ala. Code, tit. 30, §§52, 58. Challenges are permitted in order to obtain an unbiased jury. Challenges for cause are designed to allow the removal of persons with easily identifiable bias. Peremptory challenges are a means of allowing removal of persons suspected of bias, and a lawyer may rely on mere whim or intuition in the exercise of peremptory challenges. But in Talladega County the peremptory challenge has been badly perverted.

The record is clear that the striking of Negroes has nothing to do with the strategy of particular litigation or an appraisal of the qualifications or interest of any individual Negro. Negroes are struck without exception because they are Negroes and for no other reason. It is not even pre-

functions devolving upon him as such officer necessarily holds and wields great power and influence, and as a consequence erroneous insistence and prejudicial conduct upon his part tend to unduly prejudice and bias the jury against the defendant; this without reference to the restrictions of the court.

The test in matters of this kind is not necessarily that the conduct of our Solicitor complained of did have such an effect upon the jury but might it have done so? (Emphasis supplied.)

Taylor v. State, 22 Ala. App. 428, 116 So. 415-416; *Johnson v. State*, 23 Ala. App. 493, 127 So. 681, 682; *Bynum v. State*, 35 Ala. App. 297, 47 So. 2d 245.

sumed by the State that all Negroes will vote to acquit a Negro, even if charged with a crime against a white person. In this very case the Attorney-General argues that Negro defendants do not want to be tried by juries containing Negroes because of a belief that they will be treated more harshly than by whites and that Negro jurors often vote to convict. Thus, the Supreme Court of Alabama has sanctioned a consistent practice, engaged in by the representative of the State in its courts, of excluding Negroes from juries not because of a belief that striking Negroes will increase the chances of winning a given case, or provide an impartial jury, but pursuant to, and in support of, a theory of racial inferiority.

B. Negroes Have Been Summoned for Jury Service in Only Token Numbers and the State Has Offered No Explanation of the Small Proportion Called:

Negroes constitute more than one-fourth of the total number of males over 21 years of age residing in Talladega County, Alabama, but no Negro has ever served on a petit jury in either a civil or criminal case (*supra* pp. 8-9). No more than three Negroes have served on the grand jury of 18¹⁸ (R. 9, 36). Usually the number is less, and approximately 20 per cent of the time there are no Negroes at all on the grand jury (R. 21). On grand and petit jury venires Negro representation averages from 10 to 15 per cent of the total (R. 10, 19). In petitioner's case eight Negroes were called (six were available) to serve on the trial venire of one hundred (R. 202) and none served on his trial jury as a result of strikes exercised by the Solicitor (R. 205, 229). There were four to five Negroes on the grand jury venire, two of whom served on the grand jury (R. 8, 36).

¹⁸ Twelve votes are necessary for the grand jury to indict. Code of Ala., tit. 30, §89 (1958).

The Supreme Court of Alabama concluded that a sufficient number of Negroes were on the jury rolls because "from 10 per cent to 23 per cent of the members of the grand jury panels in the past several years have been Negroes" (R. 228). From the Solicitor's testimony, however, it is clear that the 23 per cent figure referred to a petit jury venire, rather than grand jury venire, and was restricted to one rather extraordinary occasion.¹⁹ The Solicitor also testified that the number of Negroes on the venires ranged from 4 per cent (rather than 10 per cent) to 23 per cent (R. 19) and averaged from 10 to 15 per cent (R. 10).

These decided variations between Negro and white participation in the jury system of Talladega County and the Negro and white proportions of the total number of eligible jurors, if unexplained by the State, are sufficient evidence of unconstitutional racial discrimination in the selection of jurors. There may be no precise "formula for determining when 'tokenism' ends and 'fair' representation begins", as was said by the Supreme Court of Alabama (R. 229), but the State must surely offer some explanation of why the proportion of Negroes on grand and petit jury venires averages at most one-half of the proportion of eligible Negroes in the population. (Cf. *Speller v. Allen*, 344 U. S. 443, 481, where the Court would not accept, unless explained, a jury box in which Negroes constituted only 7 per cent of the jurors when Negroes constituted 38 per cent of those eligible.) Although they represent 26 per cent of those eligible, Negro participation in the jury system of the county has been limited to the extent that Negroes play almost no role in the actual process of indicting, trying or sentencing persons charged with crime.

¹⁹ See note 11, *supra*.

Petitioner adduced evidence tending to show that the Jury Commissioners followed selection procedures, some in violation of state statute, which naturally tended to restrict Negro participation in the jury system. For example, only white church rolls and civic club lists were used to obtain the names of prospective jurors (R. 66). The all-white Board of Jury Commissioners relied heavily on personal contacts with friends, acquaintances and customers in selecting names for the jury roll and these contacts were predominantly with white persons (R. 97, 102, 113, 116). One Commissioner demonstrated unfamiliarity with the Negro community by testifying that his estimate of the proportion of Negroes in the population was 10 per cent (R. 105). The Clerk of the Commission, who helped gather names of prospective jurors, acknowledged that her acquaintance "was 'more or less' confined to whites (R. 72).

Further evidence of the Commission's failure to familiarize itself with the qualifications of Negro residents is found in the fact that the Commission did not place the names of every person possessing the qualifications on the jury rolls (R. 89, 117), although this is required by state statute, Ala. Code, tit. 30, §24 (1958). Neither the Jury Commission nor its clerk undertook a systematic survey or canvass of the County, or visited every precinct as required by §24, in order to obtain the names of every qualified juror (R. 89, 117). The Supreme Court of Alabama excused the Commission's failure to abide by the statute on the ground that "no evidence was presented that only Negroes had been left off. The means employed by the Jury Commission for acquiring names for the rolls simply were not exhaustive enough to insure the inclusion of all qualified persons, be they white or Negro" (R. 229).

But the failure of the Commissioners to employ "means" which were "exhaustive enough to insure the inclusion of

"all qualified persons" obviously worked to exclude a higher proportion of Negroes than whites because the Commissioners selected on the basis of acquaintance and were not as familiar with the Negro as with the white citizens of the County. This is a case, therefore, where the Jury Commissioners selected prospective jurors on the basis of personal acquaintance and did not perform "their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race." *Cassell v. Texas*, 339 U. S. 282, 290; *Hill v. Texas*, 316 U. S. 400, 404; *Smith v. Texas*, 311 U. S. 128, 132.

The only evidence offered by the State falls far short of accounting for the gap between the number of Negroes serving on jury venires and the Negro proportion of the population. Although the Supreme Court of Alabama affirmed petitioner's conviction, it did not so much as mention the evidence submitted by the State in attempted explanation of the low proportion of Negroes on the venires. This evidence consisted of inconclusive statistics regarding cases of syphilis and gonorrhea, illegitimacy, and receipt of public assistance in the County.

The statistics offered have tenuous, if any, relation to the statutory qualifications of jurors. See Ala. Code, tit. 30, §21 (1958). Alabama has made no attempt by statute to exclude from jury service persons suffering from venereal disease, fathering illegitimate children or receiving public welfare funds. While all three Jury Commissioners and the Clerk of the Commission testified at the hearing on the motion to quash, there is no evidence that any person, white or Negro, has ever been excluded from jury service on these grounds. The State apparently took the view that these statistics indicate that many Negroes in Talladega County were of questionable integrity and character and, therefore, less qualified for jury service (R. 188, 189), but

none of the Jury Commissioners testified they took such information into account when considering the qualifications of prospective jurors. Cf. *Speller v. Allen*, 344 U. S. 443, 481.

The record does not reveal the theory upon which the State would connect a contagious or congenital disease, poverty, or cases of illegitimacy to character. But regardless of their relevance, the statistics offered by the State regarding disease,²⁰ poverty,²¹ and illegitimacy²² do not establish that any significant percentage of Negroes are not qualified for jury service.

Thus the State presented no evidence on which even an inference can be based establishing a legitimate ground for

²⁰ The most that the evidence as to syphilis and gonorrhea showed was that 10 or 11 more Negroes than whites contracted syphilis (R. 188) and 12 more Negroes than whites contracted gonorrhea during 1961 (R. 190). Even assuming that these statistics refer to males over 21 (and the record does not show this to be the case), evidence that 22 more Negroes than whites contracted venereal disease in 1961 (R. 190) does not explain the decided variation between the Negro and white proportions on jury venires in a county with more than 16,000 males over 21. The State's position that these statistics cover all cases of venereal disease occurring during the year (R. 190), nullifies any possible claim that they represent a mere sample.

²¹ Viewed most favorably for the State, the evidence on receipt of public assistance showed that 44.6 per cent of recipients were Negroes although Negroes constituted only 32 per cent of the population. However, Alabama has no property test for jurors, except to the extent that illiterates must be householders or freeholders. Ala. Code, tit. 30, §21 (1958). (Some householders are eligible for public assistance (R. 195).) In the absence of evidence on the rate of illiteracy, no inference can be drawn that a larger proportion of Negroes than whites are ineligible for jury service because of poverty. Moreover, the statistics offered by the State do not classify recipients according to sex.

²² With respect to illegitimate births, the statistics offered fail to reveal the race, age or residence of the fathers of illegitimate children (R. 186-87) and so prove nothing of the character or integrity of Negro males over 21 in the County.

ineligibility of an appreciable number of otherwise qualified Negroes. "Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it" *Pierre v. Louisiana*, 306 U. S. 354, 461.

The Supreme Court of Alabama supported its determination that petitioner had not established a *prima facie* case of jury discrimination on the ground that "no evidence as to the educational level of the general Negro population was offered in support of appellant's position" (R. 229). This ruling that a *prima facie* case of systematic exclusion requires an affirmative showing by petitioner that Negroes are as qualified as whites to serve on juries is in direct conflict with the decisions of this Court. In *Norris v. Alabama*, 294 U. S. 587, 591, the Court found a *prima facie* case, which the state must refute, on evidence that although Negroes were a distinct group in the county, no Negro had ever served on a jury. "This testimony in itself made out a *prima facie* case" and "the case thus made was supplemented by direct testimony that specified Negroes, thirty or more in number, were qualified for jury service," *Norris v. Alabama*, 294 U. S. at 591. (emphasis supplied). See also *Patton v. Mississippi*, 332 U. S. 463, 466. The holding of the Supreme Court of Alabama assumes that Negroes are less qualified and, therefore, must prove they are as qualified as whites. But in *Speller v. Allen*, 344 U. S. 443, 481, the Court would not assume, without evidence from the State, that "there is not a much larger percentage of Negroes with qualifications of jurymen"; and in *Cassell v. Texas*, 339 U. S. 282, 289, this Court said ". . . with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements for jury service." See also *Hill v. Texas*, 316 U. S. 400, 404.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner prays
that the judgment of the court below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutes Involved

18 U. S. C. §243

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.

Ala. Const., Art. I, §6

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law: but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Ala. Code, tit. 30, §3 (1958)

§3. Persons exempt from jury duty.—The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any boat plying the waters of this state; passenger bus driver-operators, and driver-operators of motor vehicles hauling freight for hire under the supervision of the Alabama public service commission; railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa county and the Searcy hospital in Mobile county; officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service and convict and prison guards while engaged in the discharge of their duties as such.

Ala. Code, tit. 30, §10 (1958)

§10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions . . .

Ala. Code, tit: 30, §12 (1958)

§12. Salaries of members.—Each member of the jury commission shall be paid the sum of five dollars per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. . . . but the compensation of each member of the commission shall not exceed for any year of his term the following amounts; In counties of twenty-five thousand population or less one hundred dollars; in counties exceeding twenty-five thousand and not exceeding fifty thousand population two hundred dollars; in counties exceeding fifty thousand and not exceeding sixty thousand population three hundred dollars; and in counties exceeding sixty thousand population six hundred dollars; the population of said respective counties to be determined by the last preceding federal census.

Ala. Code, tit. 30, §18 (1958)

§18. Duties of clerk. The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission.

Ala. Code, tit. 30, §20 (1958)

§20. Jury roll and cards.—The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on

juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction.

Ala. Code, tit. 30, §21 (1958)

Qualifications of persons on jury roll. The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are gener-

ally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.

Ala. Code, tit. 30, §24 (1958)

§24. Duty of commission to fill jury roll; procedure; etc.—The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties

having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission.

Ala. Code, tit. 30, §52 (1958)

Examination of jurors.—In civil and criminal cases, either party shall have the right to examine jurors as to their qualifications, interest, or bias that would affect the trial of the case, and shall have the right, under the direction of the court, to examine said jurors as to any matter that might tend to affect their verdict.

Ala. Code, tit. 30, §58 (1958)

Oath of petit juror.—The following oath must be administered by the clerk, in the presence of the court, to each of the petit jurors: "You do solemnly swear (or affirm, as the case may be) that you will well and truly try all issues, and execute all writs of inquiry, which may be submitted to you during the present session (or week, as the case may be), and true verdicts render according to the evidence—so help you God;" and the same oath must be administered to the talesman, substituting the word "day" for "session."

Ala. Code, tit. 30, §60 (1958)

§60. Mode of selecting and empaneling juries in criminal cases other than capital cases.—In every criminal case the jury shall be drawn, selected and empaneled as follows:

Upon the trial by jury in any court of any person indicted for a misdemeanor, or felonies not punished capitally, or in case of appeals from lower courts, the court shall require two lists of all the regular jurors empaneled for the week, who are competent to try the defendant, to be made and the solicitor shall be required first to strike from the list the name of one juror and the defendant shall strike two, and they shall continue to strike off names alternately until only twelve jurors remain on the list, and these twelve thus selected shall be the jury charged with the trial of the case.

Ala. Code, tit. 30, §64 (1958)

§64. Voir dire examination of jurors as to qualifications; mode of striking in capital cases.—On the day set for the trial if the cause is ready for trial, the court must inquire into and pass upon the qualifications of all the persons who appear in court in response to the summons to serve as jurors, and shall cause the names of all those whom the court may hold to be competent jurors to try the defendant or defendants to be placed on lists, and if there is only one defendant on trial shall require the solicitor to strike off one name and the defendant strike off two names, and in case there are two or more defendants on trial, the solicitor shall strike one and every defendant shall strike one name, and they shall in this manner continue to strike names from the list until only twelve names remain thereon. The twelve thus selected shall be sworn and empaneled as required by law for the trial of the defendant or defendants.

Ala. Code, tit. 30, §89 (1958)

§89. Indictment; concurrence of twelve jurors necessary; how indorsed.—The concurrence of at least twelve grand jurors is necessary to find an indictment; and when so found it must be indorsed "a true bill," and the indorsement signed by the foreman.

Acts of Ala., Special Regular Session of 1955, Act No. 475,
vol. 2, p. 1081.

Section 1. Unless sooner required by order of the presiding Judge of the Circuit Court, the Jury Commission of Talladega County shall meet in the county courthouse in Talladega on the first Monday of October, 1955, and on said day each two years thereafter, make in a well bound book a roll containing the name of every male citizen living in the county who possesses the qualifications prescribed by law and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon their name, occupation and place of business of every person selected and if the residence has a street number, it must be given. Upon completion of the roll, the Jury Commission shall cause to be prepared plain white cards, all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the persons whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. When the cards have been so prepared, the Jury Commission shall then segregate, remove and set aside the cards bearing the names of all jurors who served as jurors during the two years next preceding September 15th of that year. The names of the jurors on the cards so removed shall continue on the rolls as qualified jurors, but the cards shall not then be placed in the jury box, but shall be retained as a reserve to be used as hereinafter provided. All other cards prepared as herein provided, shall then be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the Probate Judge, and if

there be none in that office, the Jury Commission shall deposit it in any safe or vault in the Court House to be designated on the minutes of the Commission, and one of said keys thereof shall be kept by the President of the Jury Commission. The other of said keys shall be kept by the Presiding Judge of the Circuit Court for the sole use of the Judges of the Courts of said county needing jurors. The jury roll shall be kept securely and for the use of the Jury Commission exclusively. It shall not be inspected by anyone except the members of the Commission or by the Clerk of the Commission upon authority of the Commission, unless under an order of a Judge of the Circuit Court or other court of record having jurisdiction.

Section 2. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors; or whenever it shall appear to the Presiding Judge of the Circuit Court or Court of like jurisdiction that the jury box is so nearly exhausted as to require refilling, and the said Judge shall notify the President of the Jury Commission; the said Jury Commission shall thereupon place into the jury box all cards containing the names of jurors as prepared under the provisions of this Act in Section 1 and which have been withheld from the box when filled and set aside as a reserve. Provided, however, that in placing the cards held as a reserve in the box the Jury Commission may delete and withhold the cards of the names of any jurors who have died or have otherwise become disqualified from serving as jurors.

Section 3. Notices of the requirement of the attendance of jury service may be served by registered mail, or may be served as provided by Section 33 of Title 30, Code of Alabama of 1940. Should in the discretion of the sheriff the service be made by registered mail, such service shall

be as follows: It shall be the duty of the Sheriff of the County to enclose the summons in an envelope addressed to the person to be served and place all necessary postage thereon and demand a return receipt. When a return receipt, signed by the addressee is returned to the sheriff by the post office department of the United States the sheriff shall thereupon mark the process executed and it shall be considered for all purposes as sufficient personal and legal service. In the event said jury summons so mailed should be returned to the sheriff by the post office department of the United States without delivery to the addressee then the sheriff shall immediately make every effort personally to serve said summons. The provisions of this section in reference to service by registered mail, however, shall not apply to jury summons returnable before the court instanter, but such summonses shall be served only as provided by Section 33 of Title 30, Code of Alabama of 1940.

Section 4. The clerks of the several courts in which juries are empaneled shall, from time to time as the juries are empaneled, certify to the Jury Commission the names of all persons so empaneled, and the Clerk of the Commission, under the direction of the Commission, shall note opposite the names of such persons on the jury roll the date on which and the court in which they were empaneled.

Section 5. The clerks of the several courts shall also certify to the Jury Commission the names of all persons who have been found by the Court to be disqualified or exempt, which fact shall be noted opposite their respective names on the jury roll.

Section 6. Any authority, right, power and duty heretofore imposed by law on the Jury Commission of the county or the clerk thereof, and which is not by this Act specifically repealed, shall hereafter be exercised or per-

formed by the Jury Commission or the clerk thereof, respectively.

Section 7. That all laws in conflict with any of the provisions of this Act be and the same are hereby repealed, it being the intent of the Legislature that the subjects covered by this Act be the exclusive law on such subjects in Talladega County. Provided, however, nothing contained in this Act shall be construed to limit the present authority of the Judge of the Circuit Court or other Court of like jurisdiction from exercising any of the power given such Judge under Title 30, Section 22 of the Code of Alabama 1940.

Section 8. That in the event any section, clause or provision of this Act shall be declared invalid or unconstitutional, it shall not be held to affect any other section, clause or provision of this Act, but the same shall remain in full force and effect.

Section 9. This Act shall take effect immediately upon its passage and approval by the Governor.

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SEP 28 1964

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner

v.

ALABAMA,

Respondent

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA**

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER THE METHOD OF SELECTION OF THE NAMES OF PERSONS SWORN TO SERVE AS PETIT JURORS IN TALLADEGA COUNTY, ALABAMA, RESULTS IN THE ARBITRARY AND SYSTEMATIC EXCLUSION THEREFROM OF NEGROES ON RACIAL GROUNDS IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

II.

WHETHER THE METHODS USED IN SELECTING NAMES OF PERSONS TO BE PLACED ON THE JURY ROLL AND IN THE JURY BOX AND THE NAMES OF PERSONS CALLED AS JURY VENIRES IN TALLADEGA COUNTY, ALABAMA, RESULT IN THE ARBITRARY AND SYSTEMATIC EXCLUSION OF NEGROES ON RACIAL GROUNDS FROM SERVICE ON GRAND AND PETIT JURIES IN THAT COUNTY IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes:

Act No. 475, Acts of Alabama, Special-Regular Session 1955, Vol. 2, p. 1081.

Title 30, secs. 1-100, Code of Alabama 1940, as amended (Recompiled 1958).

STATEMENT

In addition to the Statement of the Case as set forth by the Petitioner, the Respondent respectfully points out the following further facts:

The Petitioner has been represented throughout by Negro Counsel of his own choosing.

On the hearing of the Motion to Quash the Indictment, evidence was adduced that four or five Negroes were on the venire from which the Grand Jury which indicted the Petitioner was drawn and that the names of two Negroes were drawn from that venire and actually served on that Grand

Jury (R. 8); that as many as three Negroes have served on previous Grand Juries in Talladega County (R. 9); that there have not been over three or four Grand Juries in Talladega County since 1953 which have not had members of the Negro race actually serving thereon (R. 10); that many of the Negroes qualified for Jury duty have either been excused or are exempt from such duty (R. 12, 17, 18); that as many as seven and on one occasion as many as thirteen Negroes' names have appeared on the Jury venire (R. 18, 19); that as many as eighty percent of the Grand Juries organized since 1953 have had Negroes serving thereon (R. 21); that there is no discrimination on account of race or color by the Jury Commission of Talladega County in placing the names of qualified persons on the Jury Roll (R. 55, 61); that among the methods used by the Jury Commissioners in securing names of persons to be placed on the Jury Roll have been contacting officers of various plants employing both Negroes and Whites to secure the names of employees working there considered as qualified jurors, requesting various colored people to furnish lists of names of persons they would consider as qualified to serve as jurors, using city directories, telephone books, church rolls, club rolls, registered voters lists, and contacting reputable citizens (R. 64, 65); that in compiling the Jury Roll, no distinction is made between White persons and Negroes and the names are typed on the list alphabetically (R. 73) with the occupation and address following the name; that plain white cards of the same size, texture, and quality are used for making up the cards to be placed in the Jury Box (R. 73, 74); that it is often difficult to tell from an address whether the name is that of a White man or a Negro (R. 85); that names are obtained by the Jury Commission from a Farmers' Cooperative, the Rural Electrification Association, and the Farm Bureau, all of which have Negro members (R. 93, 94, 95); that in securing the names of qualified jurors the Jury Commissioners talked with both White and Negro people (R. 112).

Prior to the commencement of the taking of the testimony, it was stipulated between Counsel that the jury venire of one hundred from which the Petit Jury was struck included eight members of the Negro race (R. 202). The Petitioner then moved to have the Court declare void the Petit Jury selected to try the case on the ground that there were no Negroes selected to serve thereon, among other things, which Motion was overruled (R. 205) (emphasis added).

ARGUMENT

I.

THE METHOD OF SELECTION OF THE NAMES OF PERSONS SWORN TO SERVE AS PETIT JURORS IN TALLADEGA COUNTY, ALABAMA, DOES NOT RESULT IN THE ARBITRARY AND SYSTEMATIC EXCLUSION THEREFROM OF NEGROES ON RACIAL GROUNDS IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The right to peremptory challenges, where given by law, is absolute, and cannot be questioned either by opposing counsel or the Court. 31 Am. Jur. 195, Jury, § 233.

It has been consistently held that where there is no discrimination or violation of constitutional or other rights in the selection of veniremen or prospective jurors in the trial of a Negro Defendant, the exercise by the prosecution of its peremptory challenges to challenge Negroes drawn for service, with the result that there are no Negroes on the jury finally selected to try the Defendant, does not result in either error in the constitution of the jury or a violation of the Defendant's rights. *Hall v. United States*, 83 App. D.C. 166, 168 F.2d 161, 4 ALR 2d 1193, cert. den. 334 U.S. 853, 92 L.Ed. 1775; 68 S.Ct. 1509, reh. den. 335 U.S. 839, 93 L.Ed. 391, 69 S.Ct. 9; *State v. Logan*, 344 Mo. 351, 126 S.W. 2d 256, 122 ALR 417.

As the Supreme Court of Alabama pointed out in its opinion in this case:

"It has long been held that, where allowed by statute, peremptory challenges may be used without any assigned or stated cause. *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208. Both the Federal and Alabama jurisdictions have statutes providing for peremptory challenges. Code of Alabama 1940, Title 30, § 53; 28 U.S.C. § 1870; Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C., pp. 3407, 3423. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the Defendant is a Negro does not constitute a violation of the Defendant's constitutional rights of due process and equal protection of the law. *Hall v. United States* (*supra*); *United States v. Daniels*, (E.D. Pa.) 191 F.Supp. 129; *Watkins v. State*, 199 Ga. 81, 33 S.E. 2d 325, *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466; *State v. Logan* (*supra*). The following statement by the Michigan Supreme Court in the *Roxborough* case is particularly appropriate here:

"The reason counsel may have for exercising peremptory challenges is immaterial. This right has been granted by law, and it may be exercised in any manner deemed expedient, and such action does not violate any of the constitutional rights of an accused. If Appellant's argument is carried to its logical conclusion, it would do away with the basic attribute of the peremptory challenge, because, if such argument is accepted in all cases involving Defendants of the Negro race, the prosecutor, upon challenging prospective jurors of that race, would either have to assign a cause for such challenge or take the risk

of a new trial being granted on the ground that he discriminated because of color; as a result, no one could safely peremptorily challenge a juror where the Defendant was of the same race as the juror.' " In *Hall v. United States*, supra, the Court said:

The requirements of due process were met when there was no racial discrimination in the selection of the veniremen. The government as a litigant was entitled to exercise twenty peremptory challenges, which means that its counsel could exclude from the jury that number of persons without assigning, or indeed without having, any reason for doing so. The Constitution does not require that the Appellants, being Negroes, should be tried by a jury composed of or including members of that race. They legitimately sought to obtain the fancied advantage of having Negroes on the jury by using their peremptory challenges only against white members of the panel."

In *Harraway v. State*, 203 Ark. 912, 159 S.W. 2d 733, cert. den. 317 U.S. 648, 87 L.ed. 521, 63 S.Ct. 42, the Court held that there was neither error in the constitution of the trial jury nor a violation of the Defendant's rights because four Negroes who were drawn for service thereon were excused by the prosecuting attorney in the exercise of his peremptory challenges. The Court said that the Defendant "was not entitled to any particular juror, but was entitled to trial by a fair and impartial jury."

In a similar situation in *Whitney v. State*, 43 Tex. Crim. 197, 63 S.W. 879, it was held that there was no establishment of discrimination, and that to so hold "would be equivalent to guaranteeing a Negro Defendant a certain number of

Negroes on the jury to try him," which was not required by the Fourteenth Amendment.

As the Court said in *Watkins v. State*, the right to peremptory challenges may be exercised in a given instance because the prospective juror was a "banker, a farmer, a merchant, a mechanic, a baldheaded man, a black man, a brown man or a yellow man."

The Petitioner's reference on page 14 of his Brief to the 1961 Report of the Commission on Civil Rights, Vol. 5, pp. 93, 99, is not authority for anything as an examination of that Report will demonstrate.

On page 93 of that Report, it was stated that the Commission's staff interviewed nine attorneys of both races in Birmingham, Alabama in March, 1961, and in note 49 thereto it was stated that all agreed that there was a common agreement among local attorneys that Negroes will be stricken from the panel. The telephone book lists approximately 900 attorneys in the City of Birmingham. Thus statements made by only about 1/10th of 1% of the practicing attorneys in Birmingham were made the basis for the Commission's conclusions. Furthermore, this has no reference to Talladega County.

Again, on page 99 of that Report, it was stated that "The staff learned from a number of white attorneys and a Federal judge in Alabama in March 1961, that the prosecution (sometimes even the local United States Attorney) and defense counsel frequently agree to challenge any Negroes who appear on jury panels." The Report does not state how many white attorneys were interviewed, but they obviously were very few in view of the fact that the Alabama State Bar Association reports that approximately 2,037 attorneys are licensed in this State.

In addition, there are seven Federal Judges in this State, three United States Attorneys, and sixty seven Counties, each having a Circuit Court or other Courts of Record in which jury cases are tried.

The unreliability of this Report as authority is so glaring that it merits no consideration whatsoever.

Furthermore, that every Report, on page 97 admits the validity of the system of peremptory challenges, as follows:

"The second theory has to do with the right to be tried by an impartial jury. The Supreme Court has pointed out that 'a Negro who confronts a jury on which no Negro is allowed to sit . . . might very well say that a community which purposely discriminates against all Negroes discriminates against him.' This does not mean that every Negro accused is entitled to a racially representative jury. Such a guarantee would require the State to select juries on a race-basis, which is prohibited. It would also upset the whole institution of challenges, an integral part of the jury system. It must be remembered that the State simply provides a panel of persons qualified for petit jury service; the ultimate selection of jurors from the panel is made by the accused and the prosecution. Each side usually has the right to reject a specified number of the prospective jurors without having to give any reason for the rejection. This limited number of 'peremptory' challenges may be exercised capriciously or for unworthy reasons, and such use of them is no grounds for objection. Each party is generally entitled to reject additional persons on the panel upon showing a good reason why the challenged persons could not render a fair verdict in the case. The right to make 'peremptory chal-

lenges' and 'challenges for cause' is of benefit to both sides. Conceivably, if the prosecution had to restrict its challenges so as to insure that a member of the accused's race sat on the petit jury, it might well be unfairly handicapped."

The argument advanced is, therefore, specious to say the least.

II.

THE METHODS USED IN SELECTING THE NAMES OF PERSONS TO BE PLACED ON THE JURY ROLL AND IN THE JURY BOX AND THE NAMES OF PERSONS CALLED AS JURY VENIRES IN TALLADEGA COUNTY, ALABAMA, DOES NOT RESULT IN THE ARBITRARY EXCLUSION OF NEGROES ON RACIAL GROUNDS FROM SERVICE ON GRAND AND PETIT JURIES IN THAT COUNTY IN DEPRIVATION OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Petitioner has wholly failed to show, either in support of his various Motions or by way of argument in support of this Petition, that there has been any arbitrary or systematic exclusion of Negroes from the Grand and Petit Juries of Talladega County, Alabama.

The Petitioner has attempted to base his Petition on a hypothetical theory.

It is our contention that the relief sought should be based on the Record and on the facts.

Therefore, we shall now proceed to the truth and not rely on generalities, as Petitioner does.

The general provisions with respect to juries and the Jury Commissions of the several Counties in Alabama are found in Title 30, Sections 1 to 100, Code of Alabama 1940, as amended (Recompiled 1958). Except for certain of these general provisions, the matter is legally regulated in Talladega County, Alabama by Act No. 475, approved September 9, 1955, Acts of Alabama, Special-Regular Session 1955, Volume 2, page 1081.

When the Jury Roll is made up and the Jury Box is filled, the Jury Box is then delivered into the custody of the presiding Judge of the Circuit Court. Under the general provisions of the Law of Alabama, the Jury Box is kept in the office of the Probate Judge, and the President of the Jury Commission keeps one of the keys to the Jury Box (Title 30, Section 20, and Act No. 475, Section 1). The other key is kept by the presiding judge of the Circuit Court. More than twenty categories of individuals are exempt from jury duty in Alabama, based on the nature of the employment of the individuals involved (Title 30, Section 3). The qualifications of the jurors are prescribed by Title 30, Section 21.

By virtue of Act No. 475, the Jury Box of Talladega County is filled every two years, the Jury Commission is required to arrange the Jury Roll alphabetically and by precinct and by numerical order and cause to be written on the Jury Roll opposite each name placed thereon the name, occupation, and place of business of each person selected, and if the residence has a street number, it must be given. Upon completion of the Jury Roll, the Jury Commission is required to cause to be prepared plain white cards, all of the same size and texture and shall have written on the cards the name, occupation, place of residence, and place of business of the persons whose names have been placed on the Jury Roll; writing or printing but one person's name, occupation, place of residence and of business on one card. The cards

bearing the names of all jurors who served as jurors during the two years next preceding September 15th of that year are required to be segregated, removed, and set aside, to be continued on the Jury Roll as qualified jurors but not placed in the Jury Box at that time, but retained as reserve.

A person can be a qualified juror without being a qualified voter, and can be a qualified voter and not a qualified juror. In Talladega County, Alabama, the registration list of qualified voters is not regularly used in making up the Jury Roll.

In his Argument, the Petitioner cites certain census figures as to the male population of both races over the age of twenty-one years in Talladega County, Alabama. It should be pointed out that the Statutes do not require the Jury Roll to contain a certain percentage of the eligible male population regardless of race or color. Even if they did, the Jury Roll conceivably would contain less than a fixed percentage of the eligible *White* males as well as less than a fixed percentage of the eligible *Negro* males, since the percentage would be calculated on the *total* population, which includes women and children as well as those who have been convicted of crimes, mental incompetents, those suffering from physical disablements, aliens, and others ineligible to serve. The Argument advanced is too specious to be dignified by further comment.

There is nothing in the Constitution and Laws of the State of Alabama or in the Constitution and Laws of the United States which requires that a Jury Roll and a Jury Box be compiled in the exact ratio of the eligible White males to the eligible Negro males.

As was said by the Supreme Court of Alabama in *Fikes v. State* (1955), 263 Ala. 89, 81 So.2d 303, 309-311, rev. on other grounds, 352 U.S. 191, 1 L.ed. 2d 246 (a case, by the

way, in which two of the Attorneys representing the Petitioner here, represented the Appellant) :

"It is not appropriate to say that they [Negroes] are entitled to be represented in the same proportion as the whites are represented unless their qualifications are in the same proportion. That does not appear. The comparison without that is not an accurate guide for a determination of the question."

This Court, in *Akins v. Texas*, 325 U.S. 403, 89 L.ed. 1892, 1898, 65 S.Ct. 1276, has stated that "fairness in selection has never been held to require proportional representation of races upon a jury." In that case, it was further stated that "the mere fact of inequality in the number (of a racial group) selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race, or by unequal application of the law to such an extent as to show intentional discrimination." [emphasis supplied.]

The Law does not require that racial groups be recognized in the composition of juries; however, their continual exclusion or mere symbolic representation will constitute discrimination.

In *Cassell v. Texas*, 339 U.S. 282 (286-287), this Court stated:

"Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.

"We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected with-

out regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible. That conclusion is compelled by the United States Code, Title 18, § 243, based on § 4 of the Civil Rights Act of 1875. While the language of the section directs attention to the right to serve as a juror, its command has long been recognized also to assure rights to an accused. Prohibiting racial disqualification of Negroes for jury service, this congressional enactment under the Fourteenth Amendment, § 5., has been consistently sustained and its violation held to deny a proper trial to a Negro accused. Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race."

The evidence clearly shows that Negroes were placed on the Jury Roll, that the names of Negroes were actually drawn from the Jury Box, that Negroes were on the venires; and that, in fact, two Negroes served on the Grand Jury which indicted the Petitioner. The Petitioner has wholly failed to show that he was discriminated against because of his race or color. To the contrary, his own evidence adduced in respect to his several Motions has shown without equivocation that he was accorded the utmost consideration (probably more than that to which he was entitled in view of the heinous crime of which he was found guilty by a jury of the vicinage). Why, because he is a Negro, should he be entitled to preferential treatment?

The author of this Brief knows from personal experience, both as a defense Attorney in Alabama, Virginia, and the District of Columbia, as well as four years as Assistant Commonwealth's Attorney of the City of Alexandria, Virginia (a sum total of more than 29 years in various phases of the Practice of the Law), that Negroes with whom he has had contact (and they have been numerous) have invariably insisted that they want no Negroes to sit in judgment on them. The reason given to the writer was that each and every one of them felt that they would be more harshly treated by members of their own race if they were indicted, tried, convicted, and sentenced by their own kind. They have always seemed to have had an antipathy toward being adjudged by their own. Whether it has been due to some fear that their own race would punish them unduly for their crimes in order to set an example for the remainder of the community is not known. However, this is a fact which must be faced without regard to legal semantics.

Therefore, it seems only appropriate to mention the fact that Judge Richard T. Rives of the Fifth Circuit Court of Appeals, in his opinion for the Court in *United States, ex rel. Willie Seals, Jr., v. Wiman*, 304 F.2d 53, repeated the proposition that fairness in selection does not require proportional representation of race upon a jury venire, citing *Akins v. Texas*, 325 U.S. 403, 89 L.ed. 1692, 1696, 65 S.Ct. 1246.

We feel that the Supreme Court of Alabama was eminently right when it said that it found it "difficult to see wherein there was discrimination as alleged in these motions. In what way the Talladega County Jury Commission has discriminated in filling the jury box is not made to appear." (R. 391).

We also feel that the Supreme Court of Alabama was again eminently correct when it concluded that:

"From the evidence in this case, we see no basis for holding that the Jury Commission discriminated against the Negro race or followed a policy of 'token' inclusion of members of that race . . . Our view is that appellant has not established a *prima facie* case in support of his motion to quash the indictment." (R. 394)

~~The Petitioner ignores entirely the almost total failure of Negro leaders in the County to assist the Jury Commissioners in any way in securing the names of qualified Negroes to be placed on the Jury Roll. Yet he attempts to blame the disparity of racial representation on the White people. He refuses to lay the blame where it really lies—that is, on his own people.~~

The mere filing of Motions to Quash the Indictment, the Grand and Petit Jury venires, and the trial Jury panel does not relieve the Petitioner from the burden of supporting his allegations by proof, nor does such mere filing place the burden on Respondent of refuting such allegations.

Our view coincides with that of the Supreme Court of Alabama that Petitioner has not established a *prima facie* case in support of his Motions.

The Petitioner adopted the same evidence in support of his Motion to strike the Petit Jury venire as was used in support of his Motion to Quash the Indictment since both the Grand and Petit Jury venires were drawn from the same Jury Roll and Jury Box.

He makes no contention or argument that the method of drawing the names from the Jury Box results in discrimination. Indeed, this he cannot do since it is clear that under the procedure established by Alabama law this cannot result.

His argument on this point then is but a repetition of his argument that the Jury Roll was, unconstitutionally compiled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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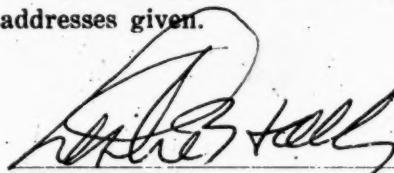
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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for Respondent, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1964, I served the requisite number of copies of the foregoing Brief upon Jack Greenberg, Constance Baker Motley, James M. Nabrit, III, Suite 2030, 10 Columbus Circle, New York, New York 10019, and Orzell Billingsley, Jr., and Peter A. Hall, 1630 Fourth Avenue North, Birmingham, Alabama, Attorneys for Petitioner, by depositing the same in the United States mail, first class postage prepaid; and properly addressed to them at the addresses given.



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APR 2 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

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IN THE
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OCTOBER TERM, 1964
No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

Petitioner respectfully urges the Court to rehear this capital case for the following reasons:

1. The opinion of the Court establishes rules governing proof of racial discrimination in jury selection which, as a practical matter, will be incapable of administration at the trial level wherever a jury commission has been compelled to abandon exclusion of Negroes and has moved to token inclusion.
2. The opinion of the Court reflects incomplete appreciation of evidence in the record demonstrating state-initiated racial distinctions infecting the jury selection process.

L.

**The Rationale of the Court's Rejection of Petitioner's
Claim of Exclusion of Negroes From Jury Venires Rep-
resents a Sharp Departure From Previous Decisions
and Entails Grave Consequences Not Adequately Con-
sidered in the Briefs or the Argument or the Opinion
of the Court.**

The Court holds that petitioner has failed, "in this case to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment", 33 U. S. L. Week 4231, 4232, because there was no "meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners", 33 U. S. L. Week at 4233, and "purposeful discrimination based on race alone is [not] satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10 per cent", 33 U. S. L. Week at 4233.

A. No prior decision of this Court has required as part of establishing a *prima facie* case a showing that Negroes are as well qualified as whites. On the contrary, the rule of exclusion, as it has been known heretofore, has required only a showing of a class constituting a distinct portion of the population and a pattern of systematic non-representation of that class, whereupon the state has been required to justify that non-representation. Both petitioner and respondent argued this cause on the premise that the burden of showing inequality between the races rested on the state, and the state attempted to assume that burden at the hearing in the Circuit Court through the use of spurious and irrelevant statistics on the incidence of venereal disease and receipt of public assistance. The burden of showing equality between the races is not one which a

Negro petitioner may realistically be expected to meet, and this Court should not place that burden upon him without considering briefs and arguments directed squarely toward the issue.

The Court appears, from its opinion, willing to entertain a rebuttable presumption that Negroes as a class are not as well qualified as white persons under constitutionally acceptable standards. Such a presumption flies in the face of the teachings of the Court since the turn of the century.¹ Moreover, if the incidence of disqualifying factors is higher among Negroes in a given county, the jury commissioners, who presumably have observed these factors, will be easily in the best position to offer proof of them; then the Negro defendant will be justly put to his proof in rebuttal. But this is a far different thing from a presumption by the Court of racial inequality.

The rule to date, as petitioner understood it, was as stated in *Cassell v. Texas*, 339 U. S. 282. There, Mr. Justice Reed, announcing the judgment of the Court, pointed out that although Negroes constituted 15.5% of the population, they constituted only 6.7% of the grand jury panels—a discrepancy of the same order of magnitude as that presented in the instant case. Mr. Justice Reed's opinion held that:

An individual's qualifications for grand-jury service, however, are not hard to ascertain, and with no evi-

¹ Such a rule conflicts with the purpose of the Fourteenth Amendment, see *Strauder v. West Virginia*, 100 U. S. 303, 306, for it implies that Negroes are known to be less qualified and should therefore prove that they possess the same qualifications as whites. Attempts to impose such a burden have been rejected in the past. *Neal v. Delaware*, 103 U. S. 370, for example, reversed a "violent presumption" of a state court that Negro exclusion was due to their lack of qualifications.

dence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements for jury service. 339 U. S. at 288-289.

Also, in *Arnold v. North Carolina*, 376 U. S. 773, the Court found a prima facie showing of jury exclusion, absent proof of the qualifications of Negroes in the community.² See also *Reece v. Georgia*, 350 U. S. 85, 88 (the burden on the state); *Patton v. Mississippi*, 332 U. S. 463, 468; *Norris v. Alabama*, 294 U. S. 587, 591 (Negroes 7.5% of the population, none on juries; prima facie case of denial).³

The lower courts—which must actually administer any rule required by the Court—have also placed the burden on the state to prove that Negroes are not as well qualified as whites. The United States Court of Appeals for the Fifth Circuit has held that the burden is on the state, not Negro defendants, to show that voter registration officials freely and fairly register qualified Negroes as electors, if such is the standard for jury service, because “the fact [rests] more in the knowledge of the State.” *United States ex rel. Goldsby v. Harpole*, 263 F. 2d 71, 78 (5th Cir. 1959). That decision was followed in *Harper v. Mississippi*, —— Miss. ——, 171 So. 2d 129 (1964).⁴ This Court’s decision

² No proof was offered of intelligence and good character, the qualifications for jury service provided by North Carolina G. S. §9-1.

³ To be sure, the Court has always treated evidence of the qualifications of Negroes as relevant, *Norris v. Alabama*, 294 U. S. 587, 598, but there is no suggestion in the cases that one claiming discrimination must affirmatively show that Negroes are as well qualified as whites.

⁴ See *United States ex rel. Seals v. Wiman*, 304 F. 2d 53, 59 (5th Cir. 1962), where the Court relied upon the fact that “[t]here was no testimony . . . that, on the average, Negroes in Mobile County are any less qualified for jury service than are whites.” See also *Bailey v. Henslee*, 287 F. 2d 936 (8th Cir. 1961); *Henslee v. Stewart*, 311 F. 2d 691 (8th Cir. 1963).

would have forced the defendant in both *Goldsby, supra*, and *Harper, supra*, to show that Negroes were as well qualified as whites to meet the selection standards of the state as to voter registration, a task difficult enough for the Department of Justice,⁵ and no doubt impossible for individual defendants. It must be remembered that virtually all Negro defendants in capital cases are indigent and usually are represented by local Negro counsel whenever the jury issue is raised, see *United States ex rel. Goldsby v. Harpole, supra* at 82; *Whitus v. Balkcom*, 333 F. 2d 496, 506-07 (5th Cir. 1964). Such Negro counsel are few and far between and are unlikely in the extreme to have available the investigative staffs which the state can muster.

Given the jury selection standards in Alabama and indeed in other states,⁶ the evidence almost entirely within the knowledge of state officials ought to continue to come from them, as it has in the past. The entirely subjective standards of juror qualifications of Ala. Code. tit. 30, §21 (1958) ("esteemed in the community for their integrity, good character and sound judgment") coupled with the vague and *ad hoc* procedure approved by the Supreme Court of Alabama make it virtually impossible for a defendant to show "that the commissioners applied different standards of qualifications to the Negro community than they did to the white

⁵ The former Assistant Attorney General who headed the Civil Rights Division has stated, "The federal government has demonstrated a seeming inability to make significant advances, in seven years time, since the 1957 law, in making the right to vote real for Negroes in Mississippi, large parts of Alabama, in Louisiana, and in scattered counties in other states." Marshall, *Federalism and Civil Rights* (Columbia Univ. 1964), p. 37. A crucial aspect of proposed bills to enforce the Fifteenth Amendment is a shifting of the burden of proof to the county concerned rather than the Department of Justice.

⁶ See Appendix at p. 1a, *infra*.

community." 33 U. S. L. Week at 4233. It is totally unrealistic to believe that a Negro defendant, faced with the scheme of a jury selection law "completely devoid of standards and restraints," *Louisiana v. United States*, 33 U. S. L. Week 4262, 4264, which vests "a virtually uncontrolled discretion," *id.* at 4263, in jury commissioners, will be capable of showing "that the same proportion of Negroes qualified under the standards being administered by the commissioners," U. S. L. Week at 4233. This evidence is peculiarly within the knowledge of those who select the jurors. If Negroes are not as well qualified as whites, then the jury commissioners will have encountered these differences and will be able to produce meaningful evidence of them.

Finally, it is said that the disparity between the percentage of Negroes on the jury venires and the percentage in the eligible population is not sufficient to make out a *prima facie* case, because, while the selection process is "haphazard" and "imperfect," there is no proof it reflects a "studied" or "purposeful" attempt to discriminate. Language implying the necessity for proof of intentional discrimination has appeared in some of the decisions of the Court, but it has been thought that the only proof required was that a system or course of conduct operate in a discriminatory manner. In *Avery v. Georgia*, 345 U. S. 559, the Court disapproved a jury selection procedure whereby names of members of the white and Negro race were put on different colored tickets; the Court held that the Negro defendant's *prima facie* burden had been met by showing a system susceptible of operation in a racially discriminatory manner and that the state had the burden of showing that purposeful discrimination had in fact not occurred.⁷

⁷ See also, for example, the explicit language of *Patton v. Mississippi*, 332 U. S. 463, 469, reaffirmed in *Eubanks v. Louisiana*,

But as Mr. Justice Clark said in *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 725, "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." And see, *Ridgeau v. Louisiana*, 373 U. S. 723, 726, where the question of who initiated the television interview of the defendant's confession was "irrelevant"; the fact that it was televised to the community was dispositive.

The requirement of proof of "purposeful" discrimination, as well as the requirement that Negroes prove that they are as well qualified as whites, will in practice, tend to restrict the prohibition of the Fourteenth Amendment to total exclusion, for it is virtually impossible to show a subjective desire to discriminate or to show a misapplication of standards, when vague and subjective standards are applied by a jury commissioner "at his own sweet will and pleasure," *Louisiana v. United States, supra*, 33 U. S. L. Week at 4264.

B. The Court found "the over-all percentage disparity" between the percentage of Negroes in the population and the percentage on the jury venires "small", saying: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%", 33 U. S. L. Week at 4233.

Petitioner submits that if numbers are to be used in this manner, it should be noted that under-representation on the grand jury was only 7.5% in *Norris v. Alabama*, 294 U. S. 587; moreover, a showing of a 10% Negro population and 0% Negro jury participation would seemingly, under the Court's rationale, fail to meet a Negro defendant's *prima facie* burden of proving jury exclusion.

356 U. S. 584, 587. See also, *Hill v. Texas*, 316 U. S. 400; as representative of the lower courts, see *United States ex rel. Seats v. Wiman*, 304 F. 2d 53, 65 (5th Cir. 1962).

In this case, whereas 26% of the total male population in Talladega County are Negroes, only 10%-15% of the persons appearing on the grand and petit jury venires have been Negroes; additionally, whereas Negroes have served on 80% of the grand juries selected (the number ranging from 1 to 3), no Negro has ever actually served on a petit jury.

The discrepancy between 10-15% and 26% with respect to the venires and the greater discrepancy with respect to actual service on grand juries (in 20% of the cases, no Negro served at all) results in an exclusion ratio of about 50% (10%-15% in relation to 26%). By reference to the exclusion ratio rather than to the percentage discrepancy, one would immediately realize that a Negro population of 13% with 0% Negro jury participation presents a clear *prima facie* case of discriminatory exclusion. The percentage discrepancy there, as here, is about 13%, but the meaningful figure is the exclusion ratio, which would there be 100%. In this case the ratio is 50%, and the lower courts might well read the instant decision as sustaining discrepancies between a Negro jury participation of 20-30% and a Negro population of 40-60%.

If an exclusion ratio of 50% is not sufficient to shift the burden to the state, it is apparent that only complete or virtual exclusion will be subject to judicial correction. Admittedly, it may be difficult to draw a bright line at which the burden will no longer be on the state. But where the exclusion ratio is so large, the standards of jury selection so subjective, the method of selection so "haphazard" and the knowledge concerning jury selection so personal to the jury commissioners (who have not shown Negroes less qualified than whites), petitioner submits that trial counsel will have an intolerable burden in any case where token inclusion is practiced.

C. The opinion of the Court places an intolerable burden of proof on the Negro defendant in another respect also. While acknowledging that unconstitutional discrimination "may well" result if a prosecutor consistently—and regardless of trial considerations—exercises peremptory strikes so that no Negro could serve on a jury in any criminal case, the Court avoids decision because petitioner failed to make the necessary proof. It is respectfully submitted that petitioner, having shown that no Negro has served on any petit jury in Talladega County, should not have to prove that the prosecutor abused his prerogatives.

Petitioner is obligated by the Court's decision to place the prosecutor on the stand to secure admissions about his intentions during the striking process, admissions which can be expected to be few since they would, in all probability, be of an incriminating nature. See 18 U. S. C. §243, *Fay v. New York*, 332 U. S. 261. The defendant in an isolated criminal case, unfamiliar with the continuous course of criminal prosecutions in the county, is unequipped to give evidence on such matter as the prosecutor's striking practices, but the prosecutor is in an excellent position to do so. He can easily establish the absence of a discriminatory pattern of peremptory strikes by showing that Negroes have served on some juries or that defense counsel bear a substantial portion of responsibility for the consistent striking of Negroes.

By placing on the defendant the burden of establishing that the prosecutor struck Negroes for reasons unrelated to the outcome of the case, the Court has formulated a rule of law removed from the realities of trial strategy and courtroom conduct. For all practical purposes the petitioner will receive but illusory protection from *Fay v. Noia*, 372 U. S. 391 and *Townsend v. Sain*, 372 U. S. 293, because of the Court's requirement that he adduce more

proof than he has already so laboriously placed on the record in this case.

II.

The Court Apparently Did Not Adequately Appreciate the Extent to Which Racial Discrimination Infects the Jury Selection Process in Talladega County.

Suppose that Talladega County had the following rule of court:

In any case in which the defendant is a Negro, the solicitor shall inquire of counsel for the defendant whether he desires to have Negroes serve on the jury. If counsel for the defendant does not desire them, all Negroes on the venire shall be struck. In all other cases jury selection shall proceed as otherwise required by law.

No one for a moment would doubt that any conviction occurring under such circumstances would violate the Fourteenth Amendment. *Anderson v. Martin*, 375 U. S. 399; *Peterson v. City of Greenville*, 373 U. S. 244. The court would not indulge in an inquiry as to whether counsel for defendant would have arrived by his own "mental urges," 373 U. S. at 248, at a conclusion to strike Negroes.

But this is precisely what happened here. The record is clear that this solicitor, without variation, at the commencement of criminal cases inquired of counsel for the defendant whether he desired to have Negroes on the jury:

If I am trying a case for the State, I will ask them what is their wish, do they want them, and they will as a rule discuss it with their client, and then they will say, we don't want them. If we are not going to

want them, if he doesn't want them, and if I don't want them, what we do then is just take them off. Strike them first (R. 27).

This is corroborated by other testimony of the solicitor:

Many times I have asked, Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them (R. 20).

This unseemly custom where the prosecutor invites consideration of jurors on the basis of their race appears to be as invariable as a rule of court and no evidence in the record qualifies this conclusion. Regardless of the view the Court takes as to what constitutes misuse of strikes, it ought not approve such conduct on the part of a prosecutor.

CONCLUSION

By requiring petitioner to prove that Negroes are as qualified as whites for jury service in Talladega County the Court has ignored contrary precedents on which both parties relied at the trial. Placing this burden on the defendant stigmatizes the Negro race and is extremely unfair in practice. The Court also fails to attribute due significance to the disparity between the percentage of Negroes in the county (26%) and their percentage on petit jury venires (10-15%). Despite complete exclusion of Negroes from petit jury service, the Court unfairly requires petitioner to show that the prosecutor was more interested in banishing Negroes than in winning cases. In both cases the burden is placed on virtually resourceless counsel for indigent defendants in capital cases, while the state has pertinent information and the ability to gather more. Finally, the Court erroneously approved an unvarying practice of prosecutor-initiated conferences with defense attor-

neys as to whether Negroes should be stricken as a preliminary matter, a practice which if embodied in a formal rule of court would be clearly unconstitutional.

This is a capital case,⁸ and petitioner respectfully urges that it not be concluded without the most solemn consideration of the substantial practical and doctrinal propositions urged herein, especially when the briefs and arguments of the parties did not focus on several propositions adopted by the Court for the first time.

Respectfully submitted,

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⁸ See, e.g., *Williams v. Georgia*, 349 U. S. 375, 391 ("That life is at stake is of course another important factor . . ."); *Hamilton v. Alabama*, 368 U. S. 52, 55 ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."); *Chambers v. Florida*, 309 U. S. 227, 241 ("Due process of law . . . commands that no such practice as that disclosed by this record shall send any accused to his death"); *Powell v. Alabama*, 387 U. S. 45, 56; *Patterson v. Alabama*, 294 U. S. 600; and see generally, Prettyman, *Death and the Supreme Court*.

CERTIFICATE OF COUNSEL

The undersigned attorney for petitioner hereby certifies
that the foregoing Petition for Rehearing is presented in
good faith and not for delay.

This day of April, 1965.

Attorney for Petitioner

APPENDIX

Qualifications for Jury Service in Eleven Southern States

	<i>Voter</i>	<i>Good Character</i>
Alabama	<i>None</i>	Code of Ala., Tit. 30, §21: "Male citizens . . . generally reputed to be honest and intelligent men and esteemed in the community for their integrity, good character and sound judgment."
Florida	Fla. Stat. Ann., §40.01	Fla. Stat. Ann., §40.01: "Law abiding citizens of approved integrity, good character, sound judgment and intelligence."
Georgia	<i>None</i>	Ga. Code Ann., §59-201 (grand jurors): "The most experienced, intelligent and upright persons." Ga. Code Ann., §59-106 (jurors generally): "Upright and intelligent citizens."
Louisiana	None, but compare LSA-R.S. §15-172 (juror qualifications) with LSA-R.S. §18-31 (voter qualifications).	L.S.A.-R.S. §15-172: "Persons of well-known good character and standing in the community."
Mississippi	Miss. Code Ann., §1762	<i>None</i>
North Carolina	<i>None</i>	N.C. General Statutes, §9-1: "Persons . . . of good moral character."
South Carolina	S. C. Code Ann., §38-52	S.C. Code Ann., §38-52: "Male electors . . . of good moral character."
Virginia	<i>None</i>	<i>None</i>
Arkansas	Grand Juror: Ark. Stat. §39-101 Petit Juror: Ark. Stat. §39-206	Ark. Stat. §39-101: "Temperate and good behavior." Ark. Stat. §39-206: "Good character."
Texas	Vernon's Ann. Tex. Stat., Art. 2133, "Qualified to vote".	Vernon's Ann. Tex. Stat., Art. 2133: "Good, moral character."
Tennessee	<i>None</i>	Tenn. Code Ann., §22-203: "Integrity, fair character, sound judgment."

U.S. SUPREME COURT
MOTION FILED

APR 3 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE, IN SUPPORT OF PETITION
FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in support of the petition for rehearing in this case. The attorney for petitioner has consented to the filing; the respondent's attorney has denied consent. Their letters have been filed with the Clerk of the Court.

The American Civil Liberties Union has been engaged for forty-five years in the national effort to secure the application of the Bill of Rights and the Reconstruction Amendments to all persons within the jurisdiction of the United States. Its work has laid special emphasis on the procedural rights protected by the due process clause of the Fourteenth Amendment and on the substantive rights protected by that Amendment's equal protection clause.

In the case at bar, the due process and equal protection clauses intersect. What is at stake is the right of a defen-

dant to receive the benefits of a fair trial regardless of the color of his skin. It is perhaps the ultimate right, for it involves the method by which a state may enforce its power to deprive a man of his physical liberty or, as in this case, of life itself.

In recent years the ACLU has engaged in special efforts to insure that Negroes in the Southern states become the beneficiaries of a fairly administered system of criminal justice. All the world knows that Negroes now are the victims of a distorted system of justice. Their second-class citizenship does not end at the steps of the court-house; it goes inside with them. *Johnson v. Virginia*, 373 U. S. 61 (1963); *Hamilton v. Alabama*, 376 U. S. 650 (1964); *Louisiana v. United States*, 33 U. S. L. Week 4262 (U. S. March 8, 1965).

The ACLU is involved today in no less than a dozen cases in Mississippi, Louisiana, Alabama, Georgia, and Florida, which challenge the systematic exclusion of Negroes from jury service in those states. The Union believes that those cases, in conjunction with the related efforts of other organizations and attorneys, promise to affect substantially the illegal tribunals which, though condemned by the Constitution, nonetheless sit in judgment on men's liberty. The Court's opinion in *Swain v. Alabama*, however, threatens to extinguish that promise. It is, in our opinion, an emphatic contradiction of the Court's earlier expressions of special responsibility for the fair administration of criminal justice.

In order to inform the Court of our views, we respectfully ask leave to file the attached brief.

Respectfully submitted,

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE, IN SUPPORT OF PETITION
FOR REHEARING**

Argument

The brazen fact in this case is that in Talladega County, Alabama, where the population consists of 20,970 Negroes and 44,425 whites, no Negro has served on a petit jury at least since 1950.

The petitioner made two claims: first, that "Negroes are unconstitutionally excluded from jury service in that the State always strikes the token number of Negroes on the trial venires with the result that Negroes never serve on trial juries"; and, second, that "Negroes have been summoned for jury service in only token numbers and the State has offered no explanation of the small proportion called." The Court rejected both claims. We shall confine our brief to the second claim. We support the first, to be sure, but for brevity's sake leave its discussion to petitioner's able attorneys.

The evidence showed that though Negroes eligible for jury service (males over 21) constituted 26% of the total eligible population, only 10 to 15% of the names drawn from the box had been Negroes.¹ The majority concluded, therefore, that "Alabama has not totally excluded a racial group from either grand or petit jury panels," that "an average of six to eight Negroes on these panels [does not constitute] forbidden token inclusion," and that "the evidence in this case [does not] make out a *prima facie* case of invidious discrimination" (Slip Opinion, pp. 3-4). Furthermore, the opinion said that "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%" (Slip Opinion, p. 6).

We believe that the interpretation of the *prima facie* rule adopted implicitly in the Court's opinion is unworkable and calls a dead halt to the improvement of the administration of justice in the Southern states.

Of all the areas of law with which this Court has dealt, there is none which has more consistently evoked uniform disposition than cases dealing with the systematic exclusion of Negroes from service upon juries. Though the Court has refused to tolerate the practice from *Strauder v. West Virginia*, 100 U. S. 303 (1880), to *Arnold v. North Carolina*, 376 U. S. 773 (1964), it has persisted nonetheless. See, e.g., *U. S. ex rel. Goldsby v. Harpole*, 263 F. 2d 71 (C. A. 5, 1959), cert. den. 361 U. S. 838 (1959) (Mississippi); *U. S. ex rel. Seals v. Wiman*, 304 F. 2d 53 (C. A. 5, 1962), cert. den. 372 U. S. 924 (1963) (Alabama); *In The Matter of Newton*, 224 F. Supp. 330 (D. C. W. D. La., 1963) (Louisiana); *Whitus v. Balkcom*, 333 F. 2d 496 (C. A. 5,

¹ The range was actually 4 to 23%. The average was 10 to 15%. The 23% occasion was extraordinary. Petitioner's brief, p. 19.

1964), cert. den. 33 U.S. L. Week 3209 (U. S. Dec. 7, 1964) (Georgia). See too, U. S. Commission on Civil Rights, 1961 Report, Book 5, Chapter 7.

We suggest that the explanation for that persistence lies in the nature of the cases the Court has decided as contrasted to the case at bar. That is to say, the Court's decisions, with one exception,² have been confined to such plainly outrageous situations, that it has been child's play to comply with their language but to ignore their substance. A brief look at the circumstances of the earlier cases will make our point plain.

1. *Strauder v. West Virginia*, *supra*. A state statute limited jury service to whites.
2. *Neal v. Delaware*, 103 U. S. 370 (1880).
White population: 124,000
Negro population: 26,000
Negroes called for jury service: None.
3. *Bush v. Kentucky*, 107 U. S. 110 (1882). A state statute limited jury service to whites.
4. *Norris v. Alabama*, 294 U. S. 587 (1935).

Jackson County

White population:	36,881
Negro population:	2,688
White eligibles:	8,801
Negro eligibles:	666
Negroes called for jury service: <i>None</i> within memory.	

² The exception is *Brown v. Allen*, 344 U. S. 443 (1953). But for the *Swain* opinion, we would have thought *Brown v. Allen* was now a constitutional derelict. Whether it is or not, will be clarified by reargument in the case at bar.

Morgan County

Total population: 46,176

Negro population: 8,311

Negroes called for jury service: *None* within memory.

5. *Hollins v. Oklahoma*, 295 U. S. 394 (1935).

Total population: 56,200

Negro population: 9,554

Negroes called for jury service: *None*.

6. *Hale v. Kentucky*, 303 U. S. 613 (1938).

Total population: 48,000

Negro population: 8,000

White eligibles: 6,000

Negro eligibles: 1,700

Negroes called for jury service: *None* for 30 years.

7. *Pierre v. Louisiana*, 306 U. S. 354 (1939).

White population: 49.7%

Negro population: 49.3%

Negroes called for jury service: *One* within memory.

8. *Smith v. Texas*, 311 U. S. 128 (1940).

White population: 80%

Negro population: 20%

White eligibles: 90%

Negro eligibles: 10%

Negroes called for jury service: 18 out of 512 over seven-year period.

9. *Hill v. Texas*, 316 U. S. 400 (1942).

White eligibles: 58,000

Negro eligibles: 8,000

Negroes called for jury service: *None* for at least past 16 years.

10. *Patton v. Mississippi*, 332 U. S. 464 (1947).
White population: 22,310
Negro population: 12,511
White eligibles: 5,500
Negro eligibles: 25
Negroes called for jury service: *Two or three over past 30 years.*
11. *Cassel v. Texas*, 339 U. S. 282 (1950).
White population: 336,959
Negro population: 61,605
White eligibles: 7,167
Negro eligibles: 5,500
Negro service on grand jury: *One on each of 21 consecutive jury over 6-year period.*
12. *Hernandez v. Texas*, 347 U. S. 475.
Non-Mexican population: 86%
Mexican population: 14%
Mexicans' service on juries: *None for 25 years.*
13. *Reece v. Georgia*, 350 U. S. 85 (1955).
White population: 55,606
Negro population: 6,224
White eligibles: 16,201
Negro eligibles: 1,710
Negroes called for grand jury service: *Six in 18 years.*
14. *Eubanks v. Louisiana*, 356 U. S. 584 (1958).
White population: 66 2/3%
Negro population: 33 1/3%
Negro service on grand juries: *One in 18 years.*
15. *Arnold v. North Carolina*, 376 U. S. 773 (1964).
White eligibles: 5,583
Negro eligibles: 2,499
Negro service on grand juries: *One in 24 years.*

In fact, then, all the earlier cases, except *Brown v. Allen*, *supra*, indisputably involved mere token inclusion.³ Nonetheless, the language of the earlier cases stated the *prima facie* rule so positively that attorneys have relied upon it with more than good reason. The language is so uniform, consistent, and forcefully expressed, that skepticism would have been a waste of energy. But that reliance turns out to have in fact been foolhardy, because the Court now says, without warning, that a defendant does not show purposeful discrimination even when one-half of the eligible Negroes in a county have not been called for jury service, when their exclusion is unexplained, and when no Negro has served on a petit jury for 15 years.

It is relevant to point out here the fallacy of Mr. Justice White's statement that the record in this case showed that Negroes were "under-represented by as much as 10%" (Slip Opinion, p. 6). As phrased, the disparity appears relatively minor.⁴ Actually, the statement is seriously misleading, because Negroes in Talladega County were under-represented not by 10% but by 50%. What Mr. Justice White meant to say was that Negroes were under-represented by 10 *percentage points*, which is quite a different thing. His 10% presumably refers to the difference be-

³ *Avery v. Georgia*, 345 U. S. 559 (1953), involved more than token inclusion but it was decided on another ground. However, Mr. Justice Reed in his concurrence concluded that a *prima facie* case was made out by a showing that a jury list contained 5% Negro names where Negroes composed 14% of the eligible jurors, that is, where Negroes were under-represented by only 9% compared to the 10% under-representation deemed insufficient in *Swain* to show *prima facie* exclusion. But see our discussion of that 10% calculation which follows.

⁴ Indeed, Mr. Justice White says, "The over-all percentage disparity has been small . . ." (Slip Opinion, p. 6).

tween the 26% figure which represents eligible Negroes and the 10-15% figure which represents the number of Negro names drawn from the box. But in absolute numbers, 26% equals 4,281 [Petitioner's brief, p. 3], and 10 to 15% equals 1,640 to 2,460. Consequently, Negroes were under-represented not by 10%, but by from 66.4% to 42.6%, an average of 54.5%.⁵

The practical issue confronting attorneys in systematic exclusion cases is to determine the point at which the state has the burden of explaining the disparity between the number of Negroes in a county and the number who have been called or who have served on juries. Common sense should inform us how to allocate that burden.

If the defense shows that Negroes are under-represented by 50% on the jury lists and totally unrepresented on petit juries, the defense knows as well as the state officers that the explanation is local segregation policy.⁶ Who then ought have the burden of trying to explain it? The answer seems fairly obvious: those who are responsible for administering the judicial system—the state officials. The Negroes not called for jury service in Talladega County cannot explain why they are not called except to say that they are Negroes. That is the *real* reason, but it is not a reason the state can offer because it is an unconstitutional reason. If the state officials have a better reason, let

⁵ In 1953, Mr. Justice Black thought that the presence of 4-7 Negroes in each jury venire of 44 to 60, where Negroes composed one-third of the county's population, was "glaringly disproportionate." *Brown v. Allen*, 344 U. S. 443, 550 (dissent).

⁶ "We start with a *fair inference*. If the segregation policy in a county is so strong that Negroes are systematically excluded from the jury system, community hostility would be generated against any 'trouble-maker' who would attempt to upset the all-white make-up of the jury system." *Whitus v. Balkcom*, *supra* at 506.

them produce it. Given the opportunity in this case, the state had the audacity to speak of syphilis, gonorrhea, illegitimacy and the receipt of public assistance. The real reasons, as the Fifth Circuit said in *Goldsby v. Harpole*, "rest more in the knowledge of the State." 263 F. 2d at 78. And the real reasons, we daresay, are constitutionally untenable.

Let us consider Mississippi for a moment, where jury service is restricted to "qualified electors." Miss. Code, §1762. In *Harper v. Mississippi*, —— Miss. ——, —— So. 2d —— (1965), the Mississippi Supreme Court reversed a conviction because of systematic exclusion. The county involved had a total population of 21,139, 8,089 of whom were Negroes. 24 Negroes were qualified electors compared to 5,172 whites. The record showed without dispute that for ten years the number of Negroes called for jury service were as follows: 1963—1; 1962—1; 1961—1; 1960—0; 1959—0; 1958—0; 1957—2; 1956—1; 1955—2; 1954—0. The Mississippi Supreme Court said "long continued omission of Negroes from jury service establishes a *prima facie* case of systematic discrimination. The burden of proof is then upon the State to refute it."

At some future time, perhaps 26% of the Negroes in that county will be registered voters. If they are called for jury service at the rate of 10-16%, will this Court say that the burden is on a defendant to prove that Negroes are qualified to vote, a procedural challenge which even the United States Government is unable to overcome. "The federal government has demonstrated a seeming inability to make significant advances, in seven years' time, since the 1957 law, in making the right to vote real for Negroes in Mississippi, large parts of Alabama, and Louisiana, and in scattered counties in other states." Burke Marshall, *Federalism and Civil Rights* (Columbia Univ. 1964) p. 37.

There was some progress being made in the hard job of whittling away at jury discrimination in the South before *Swain* came down. Now that progress is seriously threatened. If the promise of the equal protection clause is ever to be realized in the administration of criminal justice, the burden of disproving discrimination must rest on the state at least until the disparity between Negro population and Negro jury service is insignificant. That is the issue which the Court must reconsider in this case.

Both the state courts and the Fifth Circuit look here for guidance. If this Court will tolerate the 50% disparity in *Swain*, those courts will hardly require a more stringent test.

The Mississippi Supreme Court in *Harper v. Mississippi*, *supra*, closed its opinion with these words:

"We recognize that in some counties compliance with these constitutional requirements may present difficulties, but they must be surmounted if the criminal laws are to be effectively administered. The United States Constitution does not require proportional representation of the races on a jury, or even that members of a particular race must be on a particular jury. As a practical matter, what is required is that the county officials must see to it that jurors are in fact and in good faith selected without regard to race."

That is very strong language for that court. It is not speculative to say that the Mississippi Supreme Court was persuaded that of all the racial issues that come before this Court, there was no expectation that its strong stance on jury exclusion would be qualified in any way. But there

⁷ In the only other case in recent years in which the Mississippi Supreme Court reversed because of jury exclusion, it did so because it would have been "a vain and futile thing" to allow it to be reviewed by this Court. *Gordon v. Mississippi*, 243 Miss. 750, 140 So. 2d 88 (1962).

is hope now for those who would flout the constitutional command. They can and will interpret *Swain* to mean that juries selected without regard to race are not constitutionally sacrosanct after all.

In this time of rising expectations, the insistence upon strict constitutional compliance in the administration of justice is the foundation upon which all else rests. Of what use is the right to vote, the right to enjoy public accommodations, the right to a decent education, and the right to employment without discrimination, if a man is sent to jail or to his death by a jury from which a whole class of citizens is effectively excluded?

CONCLUSION

For the reasons stated above, the Court should order this case set down for reargument.

Respectfully submitted,

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